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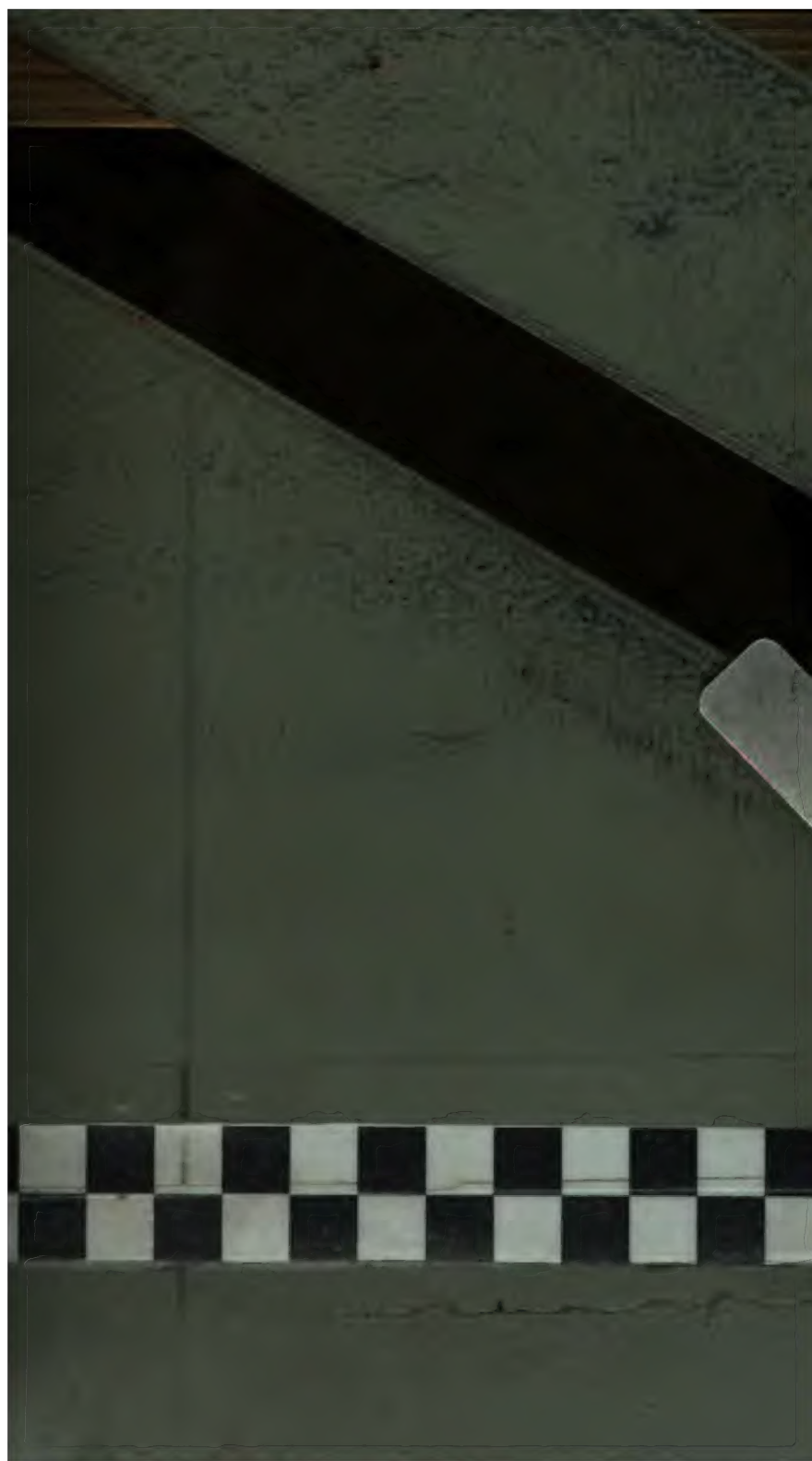
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TOPICS OF JURISPRUDENCE:

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DS TO THE OFFICE OF THE INDIAN JUDGE.

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TOPICS OF JURISPRUDENCE: c*

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Jan 21

Aids to the Office of the Indian Judge.

BY

JOHN BRUCE NORTON, ESQ.

BARRISTER-AT-LAW.

~~~~~

*Justitia est constans et perpetua voluntas suum cuique tribuendi. Juris præcepta sunt tres : honeste vivere, alterum non ledere, suum cuique tribuere.—JUSTINIAN : DIGEST.*

*Διὸ καὶ, ὅταν ἀμφισβητήσωσιν ἐπὶ τὴν δίκαστῃν καταφεύγουσιν. τὸ δ' ἐπὶ τὴν δίκαστῃν ἵέναι, ἵέναι ἐστὶν ἐπὶ τὸ δίκαιον. ὁ γὰρ δίκαστῃς βοδλεται εἶναι, ὅσον σίκαιον ἔμψυχον.*  
—ARISTOTLES, Nich. E. LV. C. 4.

The reason of the Law is the life of the Law : for though a man can tell the Law, if he know not the reason thereof he shall soon forget his superficial knowledge. But when he findeth the right reason of the Law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case out of many others : for 'cognitio legis est copulata et complicata' : and this knowledge will long remain with him.—CO. LITT : SAC. 268.

Tunc unumquodque scire dicimur, quoniam ipsum causam scire putamus. Scire autem set proprie rem ratione er per causam cognoscere.—COCKS ON LITT : SACR. 268.

"Hujus discipline studium atque cognitio in principiis quidem tetra et aspernabilis insuavisque esse et inutilis videri solet : sed ubi aliquantum processeris, tum denique et emolumentum ejus in animo tuo dilucebit, et sequetur quedam discendi voluptas insatiabilis"—AULUS GELLIVS.

0 Lord of the Manor "Land" Record.  
"Not when I entered the land as a house  
it always being a house in the  
house; — the land as a house."  
MADRAS:

J. HIGGINBOTHAM, MOUNT ROAD.

Law Bookseller and Publisher.

1862.

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(Money Market Review.)

[illegible]

see t. p.  
at end

# TOPICS OF JURISPRUDENCE:

*John*

C<sup>#</sup>

## Aids to the Office of the Indian Judge.

BY

JOHN BRUCE NORTON, ESQ.

BARRISTER-AT-LAW.

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*Tunc unusquisque scire dicimus, quum ipsam causam scire putamus. Scire autem set proprie rem ratione et per causam cognoscere.—COEN ON LITT : SECT. 283.*

### PART I.

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MADRAS:

PRINTED AT THE SCOTTISH PRESS,

BY GRAVES AND CO.

1860.

IN  
903  
NOR



CASE OF DRAKE AND OTHERS v.  
BROWN AND OTHERS.

(Money Market Review.)

THE laws of a commercial country, in regard to its every day commercial transactions, are always ~~among the clearest and best settled~~

laws, partly necessities of because the diminution of the rail amongst known and how few of the sands of money day taking subjects of the trade alternative, though the one can of the other as the most men, are then legal, and Still it will pay, happen, law, for it might the possibility men; and one of the

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modities to have, or to possess, and to buy and sell in that market. It is because he possesses, or supposed to possess, a better and more intimate knowledge of these particulars, so essential to facilitate the ready sale and purchase, and the prompt transfer of mercantile commodities from one person to another, that he becomes broker. The merchant having commodities to buy or to sell has recourse to him and employs him in that capacity, because he does not himself possess, and has no adequate means of acquiring that intimate knowledge, at the moment he may want to make use of it. The merchant or investor says in effect

...and therefore he gives no name of either buyer or seller, for that is a matter with which his client has no concern.

In the case in question, however, the buyers of the 1,000 bales of cotton being unable to pay Messrs. Brown and Co., the brokers, they failed to hand the money over to their clients; the plaintiffs, and this action was brought against them to recover £10,000 upon these contracts.

According to the well-known and universally recognised custom of the trade in London, therefore, could be no doubt whatever about their liability, but they nevertheless resolved to defend the action and put their liability to the proof, though it is possible that the action was defended merely to gain time. It answered no other purpose. A number of the first merchants in the City were called as witnesses to prove the custom of the trade, and they proved that, in all cases in which the name of the buyer is not disclosed in the contract, the broker is personally liable to his client for the purchase money. It was incidentally proved that there are cases in which specially arranged may be made between the broker and the client, in which, for instance, the broker receives  $\frac{1}{2}$  per cent. commission on the purchase money, and another  $\frac{1}{2}$  per cent. if he guarantees the payment of the purchase money. But these are special contracts, or arrangements, which must be governed by their own terms and objects; and it was clearly proved that, whether the broker receives the additional  $\frac{1}{2}$  per cent. or not, or whether he stipulates to guarantee the purchase money or not, he is by the custom of the trade personally

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at end

# TOPICS OF JURISPRUDENCE:

*John*

C<sup>#</sup>

## Aids to the Office of the Indian Judge.

BY

JOHN BRUCE NORTON, ESQ.

BARRISTER-AT-LAW.

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Tunc unumquodque scire dicimur, quum ipsam causam scire putamus. Scire autem est proprie rem ratione et per causam cognoscere.—COEN ON LITT: SAC. 233.

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PRINTED AT THE SCOTTISH PRESS,  
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1860.

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903  
NOR

(Money Market Review.)

The laws of a commercial country, in regard to its every day commercial transactions, are always among the clearest and best settled

laws, partly because the necessities of the world require that the custom of the trade should be personally known and how few of the subjects of the trade are there, those who the one can as the most men, legal, and Still it will ly, happen, law, for in it might be the possibi men; and one of the The plain carrying c and also at action, M carrying c In Decem to sell 1,000 specifying and cotton was deliveries of 500 lots of 500 one contr other 1s. delivered as their were not usag am pur it is not r tract not in perfect buyers' who It is the pur any part market commodities to have position and self in that market. It is because he supposed to possess, a better and more intimate knowledge of these particulars, so essential to facilitate the ready sale and purchase, and the prompt transfer of mercantile commodities from one person to another, that he becomes a broker. The merchant having commodities to buy or to sell has recourse to him and employs him in that capacity, because he does not himself possess, and has no adequate means of acquiring that intimate knowledge, at the moment he may want to make use of it. The merchant or investor says in effect

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MADRAS:  
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## NOTICE.

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[Business calling me to England before I could pass the entire MS. of my present Work through the Press, I have had to choose whether to let it lie over until my return, or to publish that portion which is ready. Looking to the number and the importance of the Topics already completed, and being persuaded that, however defectively executed, the work cannot but be a useful repository of legal information to those who have only too few sources of reference ready at hand, I determined on the latter course. The Second part of the Volume I shall publish as speedily as possible after my return to India, and it will contain, in addition to the remainder of the Topics, copious Indices, Tables of Contents, Lists of Cases, Translations of Quotations, Preface, &c., of the whole of the matter. In the mean time the success or otherwise of the present part will afford a fair criterion of the want of such a compendium of principles as I have endeavoured to supply. The present Part comprises nineteen distinct Topics discussed in 324 pages. A large number of carefully selected cases from the reports and passages from the best text writers illustrates the various subjects, which have been carefully supervised by my learned friend Mr. Branson, to whom I beg to express my acknowledgments for the invaluable assistance he has afforded me by his suggestions and reference to late cases. The remaining Topics, about equal in bulk the present part, will not be inferior in interest or utility to those at present laid before the public.]





# TOPICS OF JURISPRUDENCE,

OR

## AIDS TO THE OFFICE OF THE INDIAN JUDGE.

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### TOPIC THE FIRST.

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#### A FEW WORDS ON EQUITY.

*In omnibus quidem, maxime tamen in jure æquitas sequenda sit.*—PAULUS.

§ 1. The Regulations direct the Judges to administer justice in cases not expressly provided for by Law, "according to Equity and good conscience;" but no guide has been afforded towards ascertaining what Equity really is; every man is left to the devices of his own imagination, and to give a decision, which, according to his light, meets the wants of each particular case, without any reference to general principles of jurisprudence. Scarcely any instruction has been given hitherto, specially qualifying any members of the Civil Service for the judgment seat. The Law of Evidence, which pervades and overrides every inquiry that comes before the Courts, be its subject-matter what it may, has only lately been expounded; the occupants of the Bench have not enjoyed the advantages of experience at the Bar; of late years, the Registrarship, the only office which offered a chance of preliminary education, has been abolished, except in the Sudder Court; men are taken from the Revenue department and placed at once upon the supreme judgment seat in a district, their previous duties as Magistrates being thought a sufficient guarantee of their fitness for the judicial office, without respect either to their natural aptitude for the administration of the law, or to the amount of practical knowledge which they may have acquired. Some few, from a natural turn for jurisprudential studies, may have endeavoured, by private reading, to supply their unavoidable deficiencies; but still have neither a tutor to explain,

nor practice to make familiar what they learn. Until lately, there has scarcely been an attempt to procure text books on any subject, however simple or however intricate; the Regulations are in the most confused state; Circular Orders are contradictory; Reports were unknown; each judge has been left to pick his own way as best he might, according to the light of his own reason and the strength of his own intellect; this too when the quality of the evidence which he had to sift, made the task of arriving at a right decision notoriously more difficult than in European countries.

§ 2. Some attempts have been made of late years to remedy this unfavorable state of things. Reports of all the Civil Courts have been published by authority, and both Criminal and Civil Reports of the Sudder and Foujdaree Adawlut Appeals: several text books have been published on practice and procedure. Mr. Macpherson's work is interspersed with valuable introductions of legal principles: and our own Presidency has taken the lead in this praiseworthy course. Lectures have been established by the Government; and on the whole, there is hope, that a spirit of emulation has been awoke, and that the notice which the subject of the administration of justice has attracted, will produce the usual wholesome effects of publicity; that is to say, the introduction of a better system.

§ 3. The Hindu and Mahomedan Law lie in a very small compass, and are very easily mastered. But not only has the Judge in the Mofussil, in the absence of any *Lex Loci*, occasionally to deal with other Laws than these; he has to administer the Criminal Law, nominally indeed according to the provisions of the Mahomedan Law, but in truth on the enlightened principles of our own Criminal Law; but in every case there is still a necessity for guiding principles, and a familiarity with those great maxims of Equity, those "*leges legum*" which pervade and temper all laws, and on which indeed all human Law is founded.

§ 4. It is through a misapprehension of what Equity really is, that we constantly hear of "common sense" being a sufficient light for the guidance of the Judge in such cases as Mofussil practice usually brings before him; of the Company's Courts not being harassed by precedent: of the beauty and fitness of the "patriarchal" system of administering justice, which really gives irresponsible lati-

tude to the most ignorant, or the most incompetent ; to the idlest or the most hasty ; to pass whatever decision he pleases in every individual case ; supersedes all necessity for study ; and admits of such arbitrary differences, that not only may the same Law receive entirely contradictory constructions in neighbouring jurisdictions, but the same Judge to-morrow may overrule his own decision of to-day, in *consimili casu*, where the case before him is on all fours with its predecessor.

§ 5. The fallacy of the "Common Sense" argument scarcely deserves exposure. "Common Sense" is not thought a sufficient rule and instructor in other arts or sciences. Men do not make hats or shoes by the dictates of "Common Sense," but are put to a lengthened apprenticeship. Frequently the Common Sense of an instructed man is opposed to that of an uninstructed. The Common Sense of a sailor teaches him to seek the amplest sea room in a storm : the Common Sense of a landsman would induce him to hug even a lee-shore in a tempest. The "Common Sense," which alone is a safe guide, is that sense or conclusion, at which the whole, or the majority of a body of men, duly qualified on any given subject, have come to upon that particular subject. Thus, each instructed Judge goes by the "Common Sense" of *all or many Judges* ; or in other words, of men who have made the law their study. In that signification it corresponds to the '*communis*' or '*civilis*' of the Latin language.\* But in the ordinary vague signification, the term stands simply for that faculty of *reason* which is *common* to man, as distinguished from brutes, without any reference to its peculiar character in the case of the individual, who may be but a little above an idiot, or but "a little lower than the angels." And again though the faculty may be infinite, it may be in the particular case uncultivated, or trained to the highest pitch. In a word, as has been wisely and wittily observed on a question of this sort ; *It depends whose common sense it is.* Mr. George Norton, late Advocate General of Madras, in his *Rudimentals*, writes thus to the purpose.

"But, further, it is very common to find, among the most enlightened and best governed nations, those who undervalue the rules of Law

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\* In this signification it is used in Tennyson's noble ballad 'Locksley Hall.'

‘ In the Parliament of man, the federation of the world ;

There the common sense of most shall hold a fearful realm in awe,

And the kindly earth shall slumber, lapt in universal Law.’

according to which justice is administered ; making continual appeals to reason and *common sense* ; as though all forms and requisitions of such rules should be set aside when the Judge's natural uninstructed sense could suggest a different view of the case, or a different course of arriving at that view ; and as though all such forms and requisitions were but so many whims and fancies invented for the purpose of shackling the efforts of a free understanding ; such notions, however prevalent, are in truth too shallow to deserve refutation. We may assuredly declare that the universal experience of mankind throughout all countries, independently of what our reflective reason would explain, has shown that a people's prosperity must entirely depend on the certainty and merit of their rules for the administration of Justice between man and man. Those who are versed in such laws, who watch and see their operation, who best can observe how peace and security are preserved thereby, can show forth the grounds and reasonableness of the general rules by which they are guided. But such as prefer the impressions of what they call plain and common sense (but by which they can only mean their own understanding) are impatient of the restraint of set rules, the meaning and application of which they do not comprehend, they are averse to the trouble which a studious examination of them would impose—and they are mortified at every exposure of the errors which their unguided impressions betray them into. For if ignorance begets a plain boldness of decision in an arbitrary Judge, it perplexes and renders helpless one who is constrained to adjudicate according to Law.

"In no portion of the civilized world are the rules of Justice so uncertain, so obscure, and so contradictory as in India, and if justice is not worse administered there, it is owing rather to the integrity of its functionaries than to any merit of Indian Law. It has been said by an Indian Judge of great experience and learning, that 'there is scarce a question of Hindoo Law which may not be affirmed, and also denied, upon the authority of some book.' It may be well therefore to pass in review some of the more obvious mischiefs arising from the want of certain and clear rules for the administration of Justice.

"If judgments shall be given according to the individual's sense of what is just, for want of any plain and sure guide in the admitted Law, how could any man distinguish between what was the Judge's real sense of what was just, and what was his mere caprice and feeling ? If such individual sense, or caprice, or personal feeling, was the sole origin of a judgment, who could say, that any judgment was right, or was wrong ? For there would be no guide. Every man might say that his own sense was as good as that of another—every man might ascribe to his sense of right, the judgments which, in truth, were dictated by his evil pas-

sions ; and there could be no check against corruption. No man could feel, nor could he in reality be, safe in his person or his property. 'Let any one inquire what powers the Hindoo king, or even the Hindoo Brahmin possesses, over the persons of others, and he would seek to define them in vain. The power of the king is absolute and uncontrollable, he is a powerful divinity, but he is directed to act on advice, and generally through the ministration, of the Brahmins, a 'divinity in the human form': his first and main duty is 'to inflict punishment according to the Shasters.' How then do the Shasters direct punishment to be inflicted, by what rules and for what specific criminal acts? And how does the Brahmin contribute his advice, and execute his office? 'If a blow, attended with much pain, be given to human creatures or cattle, the king shall inflict on the striker a punishment as heavy as the presumed suffering!' 'A Goldsmith who commits fraud the king shall order to be cut piece-meal with razors.' 'Robbers who break a wall, or steal in the night, the king shall cut off their hands, and transfix them with a stake.' 'If a man steal a horse of small account, the Magistrate shall cut off one hand and one foot, if any small animal, exclusive of a cat or weasel, the Magistrate shall cut off half his foot,' &c. &c. 'A Brahmin is a powerful divinity, whether learned or ignorant.' 'He need not complain to the king of any injury, even by his own power he may chastise those who injure him.' 'For ill language to a Brahmin the Soodra must have a red hot iron style, ten fingers long, thrust into his mouth; for offering a Brahmin instruction, hot oil must be poured into his mouth and ears; for sitting on a Brahmin's carpet he shall be liable to have his buttock cut off.' 'But a Brahmin himself shall neither lose his property, nor be hurt in his person, although he commits all possible crimes.' 'Whatever orders the Brahmins shall issue conformably with the Shasters, the Magistrate shall execute.' (Vide Laws of Menu). Let any one examine the institutes of Menu to ascertain when and how a Hindoo son becomes incapable of inheritance. He will read of 'those distinguished by science and good conduct being allowed to take a greater share'—but, among those utterly excluded from any inheritance at all, are enumerated 'lame, blind, deaf, afflicted with any incurable disease (as, amongst others, dysentery), those who have no principle of religion, those who have lost the use of a limb.' It is plain that such general indiscriminate language as this, to say nothing of the palpable injustice of such rules, must leave the application of such Laws open to mere arbitrary discretion. What a fertile source of dispute is the capacity, or not of a Hindoo to bequeath! What are the rights of members of undivided, and of divided families?

"Thus a vague and obscure text, together with the peculiarity and

variety of irrational customs in different castes, confounds the most vital interests in uncertainty, and arbitrary constructions must supersede all regularity in judgments. In such a state of things no certainty of legal advice is attainable, and where no rights can certainly be known, there can be no end of litigation. Industry, the fountain of wealth, becomes dried up in the barrenness of insecurity of possessions. The people who do not see, or who do not heed, such evils as these must be content to live in poverty and dependence, as herds obedient to the voice of their master. What right in another to respect, and what right of his own to claim, no man can surely know, what act under what penalty to refrain from, what duty to undertake, no man can learn. If the trumpet give an uncertain sound, who shall prepare himself for the battle? These Laws, therefore, are best which leave least within the breast of the Judge. And a Judge, to be truly such, is not one who is merely sagacious in discernment, and imbued with a sincere and upright sense of the principles of justice; *but one who is learned in definite Laws*. For he is the best Judge who leaves the least to himself."

§ 6. The fallacy of maintaining that the "patriarchal" system, such as obtains in India, is best fitted for the Natives, consists in this, that we mistake what is at best the less of two evils for perfection itself. The speed and simplicity of a system of administering justice, unfettered by the complex and highly technical provisions of our Regulations,<sup>(a)</sup> is in itself a great boon to the Natives, who have a say-

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(a) One of the most common topics of vituperation in vogue with those who delight in running down a system they do not understand, is to inveigh against the technicality of the English Law. My own testimony as to the highly technical system of procedure in the Company's Courts might be open to suspicion; though I do not hesitate to record my opinion, that while Legal reform has been during the last twenty years employed in simplifying the practice of English Law, the same period has been employed by the judicial authorities in India, in building up one of the most highly artificial and technical systems the world ever saw. A witness examined before Mr. Ewart's Committee calls it a heap of technicalities; but as he was a planter, it may be more satisfactory to vouch the evidence of a Civilian. Mr. Lushington of the Bengal Civil Service, examined before the House of Lords' Committee on 21st April 1853, thus speaks of the Mofussil system in answer to question 4413. Will you state what are the principal defects to which you allude?

"The principal defect, and the one which has attracted my attention more than any other, is a palpable disposition on the part of the Superior Courts, the Company's Courts, to encourage technicalities. It is of the utmost importance in a country like India, that a simple manner of transacting business and obtaining judicial decisions should be observed. Instead of that, the great aim at present, on the part of many Judges, is to follow the precedents of English Law, whenever they can learn them, and to force them upon the Natives, who are particularly averse to them."

I observe that several civilians who have written on the subject of the Rebellion coincide in condemning the 'Regulation' system, but it is observable that the remedy of one and all points to the introduction of the 'patriarchal,' or 'non-regulation' provinces.

ing that "speedy injustice is better than tardy justice;" and as the administrators have been ordinarily selected in the non-regulation provinces, on account of peculiar qualifications, and are no doubt actuated by a sincere desire to do justice, in the aggregate satisfaction *may* have been obtained, though it is open to doubt; for silence does not always betoken consent; and any simplification of procedure in our settled districts will be a boon to the people at large. But will any man say that a system of procedure, however simple, obviates the expediency of having trained Judges: that a "patriarchal" Judge, who had pondered the principles of jurisprudence, would not be more efficient, than a young officer taken hot-foot from his regiment, and left to wade through litigation as best he might? The truth is, that, with regard to *procedure*, the more nearly a system can be reduced to this "patriarchal" form, that is to say, that it shall be untechnical, cheap, speedy, and brought home to each man's door, the better for mankind. The fallacy is, to push this argument beyond its legitimate length, and to transfer its application from the quality of the Laws, to the qualifications of the administrators of the Laws, where it has no applicability; to argue, that *because* the simpler a system of adjective procedure is, the better it is; *therefore*, the distribution of substantive justice between man and man requires no especial qualifications in the Judge. The ruder the state of society, the simpler of course will be the rules of positive Law; but still Equity lies at the bottom of even those few simple laws, which were in the first instance nothing but so many decisions according to natural Equity, which precedes Law; and as civilization advances, day by day do the relations of mankind become more complex and artificial; distinctions between rights, and regarding property, more nice and numerous; and the necessity of a paramount and overruling Equity, more apparent: but assuredly, in the proportion that advancing Society renders the Laws of a nation more complicated, the more delicate become the operations of the Judge, the more all-absorbing and isolated his functions. But even in the ruder stages of society, removed from the earliest, the very absence of positive and well defined rules renders an acquaintance with the fundamental principles of Equity and Jurisprudence imperative and indispensable; for in such a state of things, closely resembling that which now obtains in India, the very absence of definite rules throws the Judge necessarily back either



upon the universal principles of jurisprudence, or on the particular dictation of his own uninstructed reason for a guide to his decision.

*Tacitus*, in that fine passage in which he traces the origin and history of the Law,<sup>(b)</sup> points out this gradual change from simplicity to complicity.

"Vetustissimi mortalium, nullâ adhuc malâ libidine, sine probro, scelere, eoque sine pœna aut coercionibus agebant: neque præmiis opus erat, cum honesta suoapte ingenio peterentur; et ubi nihil contra morem cuperent, nihil per metum vetabantur. At postquam exui æqualitas, et pro modestia ac pudore, ambitio et vis incedebat; provenere dominationes: multosque apud populos æternum mansere. Quidam statim, aut postquam regum pertæsum, leges maluerunt. Hæ primo, rudibus hominum animis, simplices erant. Maximeque fama celebravit Cretensium, quas Minoes; Spartanorum, quas Lycurgus; ac mox Atheniensibus quæsitiores jam et plures Solon perscripsit. Nobis Romulus, ut libitum, imperitaverat: dein Numa religionibus et divino jure populum devinxit: repertaque quædam a Tullo et Anco: sed præcipuus Servius Tullius sanctorum legum fuit, quæis etiam reges obtemperarent.

"Pulso Tarquinio, adversum patrum factiones multa populus paravit tuendæ libertatis, et firmandæ concordie: creatique decemviri, et accitis quæ usquam egregia, compositæ duodecim tabulæ, finis æqui juris: nam secutæ leges, etiam aliquando in maleficos ex delicto, sæpius tamen dissensione ordinum et apicendi indicitos honores, aut pellendi clares vias, aliaque ob prava, per vim latæ sunt."

The historian *Mill*, after pointing out very philosophically the fallacy hid under the distinction usually drawn between the "summary" and "regular" methods of procedure,<sup>(c)</sup> has the following striking observations on the peculiar position of the Indian Judge.

"Well to perform the service of a Judge, skilfully to extract, and wisely to estimate every article of a complicated mass of evidence, not only peculiar experience, and that acuteness and dexterity, which are acquired by habitual practice, are of the greatest importance, but also an enlightened acquaintance with those general principles regarding law and the administration of Justice, which have their foundation in the general laws of human society, and which ought to run through and form the ground-

(b) *Annalium* L. 3. ch. 26.

(c) *Book* VI. ch. 6.

work of the laws of all nations. In a situation where the body of law is complete, and well adapted to its ends, the absolute necessity is not so great for this species of knowledge in the Judge, because he has rules for his guidance in every thing. He has few rules for his guidance in India, where every Judge must, in a great measure, be the rule to himself. Here, it is evident, he has the greatest possible occasion for the guidance of those general principles, which an enlightened education alone can give. The youth who is destined to the great and delicate duties of a Judge, in India, cannot be too carefully disciplined in that philosophy which gives the best insight into the principles of human nature; which most completely teaches the ends which the administration of justice has it in view to accomplish, and the means which are best adapted to the ends. This sort of education is of importance not only for imparting a knowledge, to the youths who become Judges, of what ought to be done; but for imparting to them a love for the ends of justice; and thus creating a grand set of motives for ensuring the performance of what ought to be done. If those on whom the legislation for India depends are in earnest for the establishment of a good administration of justice, a good education for Judges is one of the first reforms they will undertake. This reform, too, will be without difficulty; because all that is wanting is a good choice of means."

But I know not where the whole matter is better laid down than in Norton's Rudimentals, where he writes as follows:—

"Among, a savage people, without any form of constitutional Government, among whom there exist but few rights of property, and the only personal injury to be provided against is corporal violence, the rules of justice are necessarily very scanty. Under a despotic Government, where arbitrary will decides all rights, and pronounces upon all wrongs, the laws may, also, be simple and few—for under such a Government no man can claim any thing as surely and independently his own, and every man is exposed to suffer without possibility of redress what some other may choose to inflict. But under constitutional Governments, and among a people abounding in all the commodities and wealth which go to make up the resources and enjoyments of civilized life, the case is very different. Among such a people we must hear of property in land, and the various modifications of such property—of property in an infinite number and variety of goods—of descents and successions—of transfers, conveyances and contracts—of differences in rank and condition, giving rise to distinctions in rights and privileges. Under Governments where the life and the liberty of the subject is precious, and his rights of property held sacred, no man can be deprived of either without careful and regulated inquiry, and without the fullest means afforded of defence. Hence, among free and

civilized nations, the laws and rules of justice cease to be obvious to every man's plain uninstructed understanding, or to be dependent on his uncontrolled discretion: they become multiplied in proportion to the amount and variety of rights, and to their progress in freedom and wealth. The knowledge of the law necessarily becomes an object of laborious study—for the Judge who must decide, and he who would be an adviser or practitioner in the law must perform his task, not according to their own crude uninformed notions of what is right and wrong, but from the suggestions of a mind stored with a vast mass of distinct rules, and with an insight into the principles on which those rules are founded, and also with a capacity to apply these rules and principles to the infinite variety of circumstances, which in the dealings of mankind give occasion to contest and doubt."

"It is the common complaint of the vulgar, and of such as do not weigh such considerations as these, that the administration of justice according to systematic law, is tedious, troublesome, and expensive. Such complaints do not arise among barbarous and misgoverned nations—for where there is little property, or where the greater share of it is monopolized by the ruler himself or his favorites and supporters, and despotic power orders every thing, there is little occasion for litigation, or suits, and wrangling. But these complaints prevail most where the rights of the people are most numerous and various, and where the rules for their support against violations are most cautious and precise. In other words they prevail most in proportion to the prosperity, wealth, and civilization of the people among whom they arise. But, if all these rules and forms of justice, leading as they do to harassing delays, trouble, and expense, as well in the establishment as in the defence of rights—are considered with the relation they bear to the security of property and of the person, and to the degree of freedom enjoyed by the subject under a wise and liberal Government, they will be found to constitute the necessary result, and the price which must be paid for such security and freedom, on which the prosperity and wealth of a nation must depend. The ordinary and unreflecting portion of mankind, who view with a partial eye their own interests, and their claims or wrongs when they happen to be contested or denied, are impatient at all restraints upon a speedy decision, and at all forms which stand between them and what they deem justice. But, it should be recollected, that these same forms of justice, which are to them so irksome and inexpedient in cases which in their partial view may erroneously appear to be plain and simple, are the safeguards against such as may be put forward by the crafty and dishonest, and a protection against judgments given according to no fixed rule of right, but according to mere wayward and wilful discretion. If

we enquire among what nations the course of judicial decision is the most speedy, cheap, and conclusive, we shall assuredly discover it among those lawless tribes who remain nearest to the state of nature, or among those nations, in which the bulk of the people are little better than slaves. Whether in the horde of Tartar savages, amongst whom property has scarce a name, or under the most ancient Mussulman Governments where the word of the Prince or Magistrate is the inflexible law, every matter of dispute is quickly and finally settled. The Judge decides as he pleases—he is guided by no rules—and he is swayed by no responsibility. It is indifferent to him how he decides, so that he determines the case, and obedience is equally and peremptorily exacted, let the decision be what it may. To desire such a measure, and such a course, of cheap and speedy justice, is to desire such a condition of the people as can alone admit of it. It is to desire that there should be but few rights, and a small amount of property to decide about—it is to desire political slavery rather than liberty—and that right and wrong should become mere matter of chance.”

§ 7. Formidable as are the errors into which the Judges of the Company have fallen, their difficulties are at least as formidable as their errors. The wonder is, not that they have done so badly; but they should have done no worse; and nothing but a conscientious determination to do right, and to discharge their duty according to the best of their abilities, can have prevented the administration of justice in the Company's Courts from long since having become an *intolerable* evil to the people of the country.

§ 8. It is my hope, my desire, and my endeavour, by this present undertaking to open to the Indian Judges *some* of those universal principles which lie at the foundation of *all* Law; a knowledge of which at least lends an aid to the science of legal judgment, and puts the possessor on the track of those sources of jurisprudence which he must search thoroughly for himself, if his aim is to become a really deep master of the Law which he professes to administer. And in performance of the task which I have undertaken, I have adopted the plan of throwing illustrations and striking cases under the head of various leading Maxims, because experience has taught me, that it is through the epigrammatic brevity, the pith, and point of Maxims, that general principles are most easily and surely imprinted on the memory. They

serve too as nuclei, round which each man may gather for himself the results of his own research and practice.

§ 9. These maxims are scattered through the Reports of English Law, Common Law and Equity : but they are for the most part drawn from the Roman Civil Law, that vast repertory of jurisprudence ; and indeed the student of our early English jurisprudent, Bracton, will be surprized to find how very largely the principles of the Roman Law enter into even the Common Law of England. The Law student of the present day has a comparatively easy task before him. His predecessors had to wade through volumes of black letter learning and dry reports ; he had to make his own commonplace book ; and the study of the Law has been compared to eating saw dust without butter ; but though the area of Law has increased with years, and for every volume of reports formerly to be studied, there are now ten, yet excellent text-books have been compiled on all the leading subjects of the Law ; Lectures have been instituted in our Inns of Court : a more liberal tone has been given to forensic studies, and the riches of the Civil Law have been opened up and freely commented on. The publications by the late Mr. *John Smith* of his *Leading Cases in Common Law*, was an epoch in legal history ; since which, the most compendious method which he then displayed, of conveying vast legal learning to the profession and the public, has been ably followed up. We have "*Leading Cases*" with ample notes, after the same model, in Equity, and also on conveyancing and real property Law. We are promised a similar contribution with reference to Mercantile Law. The labours of the American Jurist Story have furnished us with a valuable series of text-books on some of the most important topics of the Law ; the commentaries of Blackstone, if not rewritten, have been adapted and brought down to the exigencies of the present day : and the division of labour, necessitated throughout the profession by the ever-increasing superficialities over which legal learning is accumulating, has led to the publication of special works upon special subjects, which vastly facilitate the researches both of the professional practitioner and the student, while they are not abhorrent even to the general reader. An excellent illustration of the narrow education of our practical English Barristers is given by Mr. *Chitty* which shows how circumscribed may be the circumference of each man's vision ; and how it be-

comes the Jurist to carry his researches into *all* the departments of the Law which mutually reflect light upon one another.

"Recently, a *common law barrister*, very eminent for his legal attainments, sound opinions, and great practice, advised that there was *no remedy whatever* against a married woman, who, having a considerable separate estate, had joined with her husband in a promissory note for 2500*l.* for a debt of her husband; because he was of opinion that the contract of a married woman is absolutely void, and referred to a decision to that effect, viz. *Marshall v. Rutton*, 8 Term Rep. 545, he not knowing, or forgetting, that, in *Equity*, under such circumstances, payment might have been enforced out of the separate estate. (*Bullpen v. Clarke*, 17 Ves. jun. 366; *Hulme v. Tenant*, 1 Bro. P. C. 16; *Stewart v. Lord Kirkwall*, 3 Madd. Rep. 387. *Bingham v. Jones*, at Rolls, 1832; Chitty on Bills, 8th ed. 791; *Field v. Sowle*, 4 Russ. Rep. 112). And afterwards, a very eminent *Equity counsel*, equally erroneously, advised, in the same case, that the remedy was *only in Equity*, although it appeared upon the face of the case, *as then stated*, that, after the death of her husband, the wife had *promised* to pay, in consideration of forbearance, and upon which promise she might have been *arrested and sued at law*. (*Lee v. Muggeridge*, 5 Taunt. Rep. 36; and *Littlefield, v. Shée*, 2 B. & Adolp. 811). If the common law counsel had properly advised proceedings in *Equity*, or if the *Equity counsel* had advised proceedings by arrest *at law*, upon the promise, after the death of the husband, the whole debt would have been paid. But, upon this latter opinion, a bill in Chancery was filed, and so much time elapsed before decree, that a great part of the property was dissipated, and the wife escaped, with the residue, into France, and the creditor thus wholly *lost his debt*, which would have been recovered if the proper proceedings had been adopted in the first or even second instance. This is one of the *very numerous* cases, almost daily occurring, illustrative of the consequences of the want of, at least, a *general knowledge of every branch of law*."<sup>(d)</sup>

There are several excellent collections of Maxims; *Bacon's, Noy's*, and others; but Mr. *Broome* has conferred a signal benefit upon the legal world at large, by his excellent Treatise on Law Maxims, the more important of which he has illustrated with much simplicity and learning.

§ 10. Equity, in its largest sense, *precedes* Law; for Law must be founded upon equitable principles, of which Laws are but the

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(d) General Practice of the Law, Vol. I. Pref. viii. Note a.

general declaration, "*Il faut donc avouer,*" says Montesquieu, "*des rapports d' Equite anterieures a la loi positive qui les etablit.*"<sup>(e)</sup> If we assume that the patriarchal was the earliest form of civilised society, the decisions which the head of the family or tribe pronounced, were but so many isolated applications of the universal Equity to the actual occurrences before them. Each of these, written down, or remembered traditionarily, would be a rule, precedent, or Law, for similar cases. When, however, in a more advanced state of Society, the Legislature promulgated written Laws, these, from the very necessity of the case, were general; for they were the application of finite rules to infinite circumstances. Hence, by their very generality, the Laws might work hardship in special cases, and here Equity came in to temper the otherwise harsh operation of the general Laws.

§ 11. In England, the jurisdiction of the Common Law and Equity tribunals became accidentally totally distinct and separate. With reference to the Laws of our own country, we use the term Equity in a very restricted and very technical sense; it is almost synonymous with the working of our Chancery Courts, and it is from the decisions of these Courts that I shall principally draw my principles of Equity, and my illustrations. But it must be understood, that in attempting to show some of the fundamental principles of Equity, I am not striving to introduce into India the working of English Chancery Courts, or to restrict the Courts of this country to their technical system, or to assimilate the Courts of the two countries. I am striving to explain those principles which must guide the decisions of *all* Equitable tribunals, be their locality what it may; and whether the matter for decision be of a civil or criminal nature; provided for by the express written Law of the land, or based on immemorial, unwritten, custom; or apparently altogether unprovided for, and a *res integra*, or *primæ impressionis*.

§ 12. It is not only in India that the character of Equity has been misapprehended. The province of Equity has been much misunderstood even by the sages of the Common Law in England, who have sneered at it, as vague, varying, and wanting in uniformity, and as-

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(e) *Esprit de Loix*. L. 1. C. 1.

'Avant qu'il eut des lois faites, il y avait des rapports de justice possibles : Dire qu'il n'y a rien de juste ni d' injuste qu'ce qu' ordonnent ou dependent les lois positives, c'est dire qu'avant qu'on eût tracé de cercle, tous les rayons n'étaient pas égaux : ' is the reasoning on which he arrives at the conclusion in the text.

serted it to be the mere expression of the conscience of the Chancellor or Keeper of the Seals for the time being. Thus in *Selden's Table Talk* we find the following extraordinary passage.<sup>(f)</sup>

"Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one, as if they should make the standard for the measure, a Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot: a third an indifferent foot: 'tis the same thing in the Chancellor's conscience."

§ 13. If this were a truthful description of Equity, even in its restricted and empirical sense, as practised in the English Courts of Chancery, there would be no certainty in the Law, and *misera est servitus ubi jus est vagum aut incertum*. Precedent would be of no force: the most solemn decisions of the wisest Judge might be arbitrarily set aside by his immediate successor. It is true that Equity affords a wider scope for the discretion of the Judge than the strict Law; but discretion is itself a science: and it is by entrusting the largest powers of discretion to those who have not made it a science, however conscientious their intentions, that we pave the way for errors of the gravest character: for it is, says *Paulus*, in questions *de bono et æquo*, in quo genere plerumque sub auctoritate juris scientia perniciose erratur.

Sir *Joseph Jekyll* has excellently well expressed the real province of Equity.

"The Law," he says, "is clear, and Courts of Equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in Equity are said to be *secundum discretionem boni viri*, yet when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum qui leges juraque servat*; and as it is said in *Rook's* case, 5. Rep. 99 b., that discretion is a science, not to act arbitrarily according to men's wills and private affections; so the discretion which is executed here, is to be governed by the rules of Law and Equity, which are not to oppose, but each, in its turn, to be subservient to the other; this discretion, in some cases, follows the Law implicitly, in others, assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court.

(f) *Selden's Table Talk*. Tit: Equity.



That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with."<sup>(g)</sup>

This description of the province of a Court of Equity, and the boundaries of its jurisdiction, is pronounced by Sir *T. Clarke*, M. R. to be full and judicious, and what ought to be deeply imprinted on the mind of every Judge.

§ 14. A Court of Equity in England works by its *settled rules*, as completely as does a Court of Common Law. Lord *Redesdale* in *Bond v. Hopkins*<sup>(A)</sup> says :

"There are certain principles on which Courts of Equity act, which are very well settled. The cases which occur are various : but they are decided on fixed principles. Courts of Equity have, in this respect, no more discretionary power than in Courts of Law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles : but the principles are as fixed and certain as the principles on which the Courts of Common Law proceed : " and 3d Blackstone 432. "The system of our Courts of Equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing a wife her dower in a trust, yet allowing the husband his curtesy : the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interest shall not exceed that penalty ; the distinguishing between a Mortgage at five per cent., with a clause of reduction to four, if the interest be regularly paid, and a Mortgage at four per cent. with a clause of enlargement to five, if the payment of the interest be deferred ; so that the former shall be deemed a conscientious, the latter an unrighteous bargain : all these and other causes that might be instanced, are plainly rules of positive Law ; supported only by the reverence that is shown, and generally very properly shown, to a series of former determinations ; that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule."

§ 15. As we shall see hereafter, instead of overruling, Equity follows and is subservient to the Law. And as an instance of its being

(g) *Comper v. Comper*, 2 P. W. 753.

(A) 1 Sch. and Lef. 428-9.

bound by the same rules, we may refer to the law of evidence, to cases of construction of statutes, and the general principles of interpretation. On this *Blackstone* has well expressed the truth.

"It is said that a Court of Equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a Court of Law. Both, for instance, are equally bound, and equally profess to interpret statutes according to the true intent of the legislature. In general Law all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words of the Legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the Equity of an act of Parliament; and so cases within the letter are frequently out of the Equity. Here by Equity we mean nothing but the sound interpretation of the Law; though the words of the Law itself may be too general, too special, or otherwise inaccurate or defective. These, then, are the cases which, as Grotius says, '*lex non exactè definit, sed arbitrio boni viri permittit*, in order to find out the true sense and meaning of the Lawgiver from every other topic of construction. But there is not a single rule of interpreting Laws, whether equitably or strictly, that is not equally used by the Judges in the Courts both of Law and Equity: the construction must in both be the same, or, if they differ, it is only as one Court of Law may also happen to differ from another. Each endeavours to fix and adopt the true sense of the Law in question; neither can enlarge, diminish, or alter, that sense in a single tittle."<sup>(1)</sup>

In *Judge v. Pritchard*<sup>(2)</sup> Lord Eldon well defines the modern rule. "The doctrines of this Court" says he "ought to be as well settled and made as uniform *almost* as those of the Common Law: *laying down fixed principles*; but taking care that they are to be applied *according to the circumstances* of each particular case,"

§ 16. The Equity Judge can no more depart from the principles of Equity, when he has once ascertained what they are, than the Common Law Judge from the strict Law which he has sworn to expound. Both may occasionally have reason to exclaim, *Perquam durum est, sed ita lex scripta est*. In an old book in my possession, *Francis's Maxims of Equity*, published in 1789, the author,

(1) *3 Blackstone's Comm.*: 431.

(2) 2 Sw. 414.

himself an Equity Lawyer, thus points out the difference, as he conceives it, between Law and Equity.

“But the great difference between a Court of Law and a Court of Equity, is this ; that the Court of Law, rigidly adheres to its own established rules, be the injustice arising from thence, ever so apparent ; whereas the Court of Equity will not adhere to its own most established rules, if the least injustice arises from thence ; for the same reason, that enforces it to supersede the rules of Law will enforce it to supersede its own rules also. But it cannot from thence be inferred that it is governed by no rules at all : besides such an inference is easily to be disproved from matter of fact ; for it is certain that many of the rules of Equity, have yet been preserved inviolable in all cases, because they have never been found to be unjust.”

My father, the late Mr. Justice *Norton* of the Madras Supreme Court, has written the following note in the Margin.

“This is not the fact. Equity equally with Law adheres to its own general rules though such an adherence may perhaps work occasional injustice. The grand distinction between Law and Equity in England appears to consist in the *different manner of administering justice and the different powers of the Court for that purpose.*”

Accordant with this is *Blackstone*. 3. Comm : 434.

“The systems of Jurisprudence, in our Courts both of Law and Equity, are now equally artificial systems, founded in the same principles of justice and positive Law ; but *varied by different usages in the forms and mode of their proceedings.*”

§ 17. And it is the undoubted fact, that the most distinctive feature between Courts of Law and Equity in England consisted in their manner and power of working. It is this which has drawn the most marked boundaries between them, and has settled the jurisdictions of each. For we frequently find that the Common Law Judges, in pursuance of what they conceive the equity of a case, arrogated to themselves powers and a latitude of construing positive Law, which have overstepped the limit between the judicial and legislative functions ; and assumed authority inconsistent with the fundamental maxim, *Judicis est jus dicere, non dare.*

§ 18. I am addressing myself to the condition of things in India. The separation of Law and Equity *may* be necessary in England ; but if so, it is a necessary evil. It is an anomaly presented by

no other nation, save Rome, in ancient or in modern history; except indeed by America, whither the Colonists took with them the Laws and procedure of the mother country. But the example of America, which has abolished the separate jurisdictions of Common Law and equitable Judges, shows that the junction *can* be effected, and affords a complete answer to all arguments drawn from the impossibility of the attempt. Whether, under all the circumstances of the case in England, it is expedient to follow the precedent set by America, it is not necessary for me to consider. Society is in a very artificial and advanced state at home; the distinction of the Courts is well known, the division of labour may be attended with benefit; and there is the force of weighty opinion, if it be not prejudiced, against the change. Lord *St. Leonards*, in one of his earliest publications, when he was a very young man, expressed himself thus; that he would deserve ill of his country who should seek to unsettle the distinctions between the two sets of Courts. I know not whether that opinion, which was then only not in advance of the age, has been modified since; but this is certain, that the boundaries have been growing finer and finer of late years, and that further changes are contemplated which will still more assimilate the working, and make common occupation of the grounds of the two sets of jurisdictions.

§ 19. To pursue somewhat farther this striking feature in our English Courts; the difference of their modes of working.

I. Common Law could seldom interpose to *prevent* a wrong or injury. Its remedy was generally by giving the injured party *damages* for the loss he *had* sustained. And hence, one main distinction between our Law and Equity Courts. It is manifest that in a great variety of cases such a remedy was totally inadequate. Put the case of ornamental timber being felled in a park by a yearly tenant; how could any pecuniary damages compensate for the destruction of the beauty of the family seat? Here, though money might *salve*, it could not cure; and even if it could, prevention is better than cure. Hence Courts of Equity interfered by *Injunction*, borrowed from the '*Interdictum*' of the Prætor;<sup>(2)</sup> and though this power was resisted by the Courts

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(2) See Institutes, Lib. IV. Tit. XV. *Justinian* divides interdicts into three classes, prohibitory, restitutory, exhibitory: the last of which is the foundation of our *Habeas Corpus*. The following passage from *Justinian* explains this subject:—

*Prohibitory interdicts are those whereby the Prætor forbids something to be done: as, for instance, where he forbids the forcible disturbance of a person in possession without legal advice, or the*

of Law, and gave rise to one of the most celebrated quarrels in forensic history, that between Lord *Coke* and Lord *Bloomers*, it was ultimately formally established; and thus we trace the origin of one of the differences in "manner" and "power" of working between our Equity and Common Law Courts.<sup>(2)</sup>

*Misford* in his *Equity Pleadings* (p. III.) writes thus:—

"The jurisdiction of a Court of Equity has been noticed in a former page and from thence it may be collected, that the Jurisdiction, when it assumes a power of decision, is to be exercised, where the principles of Law, by which the ordinary Courts are guided, give a right, but the powers of those Courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; where the Courts of ordinary jurisdiction are made instruments of injustice; where the principles of Law by which the ordinary Courts are guided give no right, but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive Law is silent: and it may also be collected that Courts of Equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction, to remove impediments to the fair decision of a question in other Courts; to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by Law entrusted, or by persons having immediate but partial interests; to restrain the assertion of doubtful rights in a manner productive of irreparable damage; to prevent injury to a third person by the doubtful title of others; and to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits; and farther, that Courts of Equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction, to compel a discovery, or obtain

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*burial of a dead body where it ought not to be buried, or the erection of buildings on sacred ground, or in a public river, to the injury of the navigation of the stream.*

*Restitutory interdicts* are those whereby the Prætor orders the restitution of something: as, for instance, the restitution of any thing to a person forcibly dispossessed.

*Rehibitory interdicts* are those whereby he commands the production of a person or a thing: as, for instance, of a man concerning whose liberty there is a dispute, or of children to their parents in whose legal power they are. *Habeas Corpus*.

(2) The Prætor, whose was an equitable jurisdiction, was only *custos*, not *conditor legis*: *judicia excoercere potuit*; *jus facere non potuit*; *dicendi non condendi juris potestatem habuit*; *jurare, supplere, interpretare, mitigare jus civile potuit*; *mutare vel tollere non potuit*.

This excellently describes the province of an Equity Judge in our own system. So the illustrious *Grotius* writes (*De equitate*. § 12) *fl. autem ea correctio, non tollendo legis obligationem sed declarando legem in certo casu non obligare*.

evidence which may assist the decision of other Courts ; and to preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation."

II. So again, in many cases damages afforded but a poor reparation, where the mischief was *not* irreparable ; as where the article was not destroyed, but the defendant refused to give it up. In two "forms of Action," "Detinue" and "Trove," the judgment was, that damages should be paid *unless* the thing demanded was delivered up. But even here it was optional with the defendant to avoid the delivery by paying the damages ; and yet the article might be of inestimable value in the eyes of its lawful owner. Put the case of its being an heir-loom, or other thing which possessed a '*pretium affectionis* ;' surely damages were but a poor substitute for the thing itself ? So in all that large class of cases, in which contracts entered into, had been broken, the only satisfaction at Common Law consisted in pecuniary damages. But Equity decreed the restoration of the thing itself ; and holding that what a man had contracted to do, he ought in conscience to be made to do, it decreed him to fulfil his contract, and hence another distinctive 'manner' and 'power' of Equity, in its compulsory enforcement of "*Specific Performance*."

III. So again ; at Common Law *parties* could not be examined on oath ; but Equity searched the conscience of the Defendant, and compelled him to answer the Plaintiff's Bill upon oath ; and hence, previous to the recent changes in the Law of Evidence, the jurisdiction of Equity to enforce a 'Discovery ;' for which purpose it was frequently had recourse to in aid of an action at Law.

IV. So the refusal of Courts of Law to recognize Trusts threw another class of rights into the administration of Courts of Equity. Courts of Law refused to look beyond the Trustee in whom the legal Estate lay. Courts of Equity regarded the rights of the *Cestui qui trust*, that is, the person beneficially interested ; Equity got behind the Trustee, who it would not allow to be a screen for injustice ; and hence the vast jurisdiction of Equity in matters of 'Trust' corresponding to the '*Fidei Commissa*' of the Roman Law.

V. In many cases, though there was a remedy at Law, it was not so complete as that which was afforded in Courts of Equity. The judgment of a Court of Law was a short dry decree for

the payment of a specific sum. Decrees in Courts of Equity are more pliant, and could be moulded to the peculiarities of each individual case ; so as to settle and provide for the rights of numerous parties. So by its machinery, the Court of Equity had powers of taking *accounts*, which were wanting in the Courts of Law, and hence the Equity jurisdiction in matter of *Account*. So in rectifying errors, the result of *accident*, *mistake*, *surprise*, or *fraud*, though Courts of Law under certain conditions entertained jurisdiction of such matters, the relief afforded in Equity was far more ample and complete. Thus *Blackstone* says of accidents :

“ Many accidents are also supplied in a Court of Law ; as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths, which make it impossible to perform a condition literally, and a multitude of other contingencies ; and many cannot be relieved even in a Court of Equity ; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement.”<sup>(m)</sup>

And it will be shown hereafter, when I come to these various heads of Equity, what are the principles on which they are adjudicated. For the present this must suffice to mark out the grand boundaries between Equity and Common Law in England, and to prove the correctness of Mr. Justice *Norton's* marginal remark, that ‘manner’ and ‘power’ constitute the chief difference between the two jurisdictions.

VI. This enumeration of the peculiar powers of Courts of Equity under the English system would not be complete, were I to omit mentioning some of the other principal heads of Equitable jurisdiction. Such are *Charities* ; such, the *administration* of the Estate of a Testator or Intestate ; *Partnership* affairs ; *Legacies* : *Mortgages* ; *relief against penalties and forfeitures* ; care of the property and persons of *Infants* ; and of *married women* and *Lunatics* ; and the securing evidence for the purpose of future litigation.

§ 20. On the other hand, Courts of Equity were in some matters powerless ; and large as was their jurisdiction, it was singularly defective. Thus where a purely legal question arose, they could not themselves settle it ; but left it to the Courts of Law to decide upon a “ feign-

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(m) 3. Comm : 431.

ed issue," which was drawn up and sent to them for that purpose. Thus, when the *fact* of a Will is in dispute, in a Suit in which a Will is before the Court, it directed an Issue '*Devisavit vel non*' to the Common Law Court, if the Will concerned real estate ;<sup>(n)</sup> or remitted the question to the Ecclesiastical Courts, if the Will were one of personalty. So in other litigations, a matter of fact was often ordered to be determined by a Court of Law, on the ground that trial by Jury was a more satisfactory method of eliciting fact than the written testimony taken in secret in Equity. So also, where a question of *mere law* arises, as what estate the words of a Will create, it was the practice to refer the question to the Common Law Courts, for the decision of the Judges, upon a case stated for their opinion. *Blackstone* thus writes :—

"The Chancellor's decree is either interlocutory or final. It very seldom happens that the first decree can be final, or conclude the cause ; for, if any matter of fact is strongly controverted, this Court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by Jury ; especially such important facts as the validity of a Will, or whether A. is the heir at law to B., or the existence of a *modus decimandi* or real and immemorial composition for tithes. But as no Jury can be summoned to attend this Court, the fact is usually directed to be tried at the bar of the Court of King's Bench, or at the Assises upon a feigned issue. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff by a fiction declares that he laid a wager of 5 £ with the Defendant, that A. was heir at Law to B., and then avers that he is so ; and therefore demands the 5 £. The defendant admits the feigned wager, but avers that A. is not the heir to B., and thereupon that issue is joined, which is directed out of Chancery to be tried : and thus the verdict of the Jurors at Law determines the fact in the Court of Equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans and are also frequently used in the Courts of Law, by consent of the parties, to determine some disputed rights without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

"So likewise, if a question of mere Law arises in the course of a

(n) See Lord *Mansfield's* observations in the great case of *Miller v. Taylor* touching an author's copy right, in 4 Burr. 2377. The Court of Exchequer on the Equity side does not direct a case for a Court of Law, as the Court of Chancery does ; but being also a Court of Law, directs the matter to be heard before the full Court. See *Gaskell v. Gaskell*. 3 Y. and J. p. 305.



cause, as whether by the words of a Will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this Court to refer it to the opinion of the Judges of the Court of King's Bench or Common Pleas, upon a case stated for that purpose wherein all the material facts are admitted, and the point of Law is submitted to their decision : who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the Chancellor. And upon such certificate the decree is usually founded."

§ 21. Recent reforms in the Law have materially affected these separate jurisdictions of the Courts of Law and Equity, each of which is gradually encroaching on the ground formerly appropriated by the other ; the distinctions are gradually growing finer between them : 'thin partitions do their bounds divide,' and the day is perhaps not far distant, when every Court in the realm shall be open to suits and actions of all kinds, and be made competent to deal from first to last with every dispute that is brought before it.

§ 22. These changes have been principally introduced by giving more powers to the Courts of Common Law, and by the alteration of the Law of Evidence.

I. Thus by the Common Law procedure Act, Courts of Common Law can in certain cases now grant an *Injunction*.<sup>(a)</sup>

II. Thus by 17 and 18 Vic. I. 125. 83, they can receive *Equitable* defences ; and thus a large class of cases is withdrawn from the Chancery Courts. For instance in an action to try the title to lands, substituted for the old action of Ejectment, a Defendant who has not the legal title in him, will not any longer be driven into a Court of Equity, to set up a defence, which under the old practice, afforded him perfect security in Equity, though it was not available to him at Common Law.

III. Thus by the Evidence Act,<sup>(b)</sup> as *parties* are now examinable, there can be no need of the aid of a Court of Equity in that large class of cases where formerly the jurisdiction attached through the impossibility of otherwise obtaining a *Discovery* ; or in other words enforcing the examination of the Defendant on oath. As

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(a) 15 and 16 Vic. C. 76, 836.

(b) 14 and 15. Vic. C. 96. Indian Act 31 of 1845, 19.

a general rule, our English Courts of Equity are not competent to give damages for a breach of contract or injury where redress can be had at Law. Compensation can however be granted where the party comes to the Court for a specific performance; as we learn from the Leading Case of *Seton v. Slade*<sup>(g)</sup> and the recent case of *Prothero v. Phelps*<sup>(r)</sup>; and a quære has been made in *Geary v. Norton*,<sup>(s)</sup> whether damages should be given on an injunction restraining an infringement of patent. The Solicitor General in his Equity Procedure Bill (1858) proposes to give the Court power to award damages either in addition to, or substitution for, specific performance or injunction.

§ 23. On the other hand the *vivâ voce* Examination of witnesses in Courts of Equity has done away with the reason for directing issues of fact; and a Bill has been introduced with the object of giving Courts of Equity full power of deciding all such matters as arise incidentally before them, without the circuitous, dilatory, and expensive process of directing a feigned issue.<sup>(t)</sup>

§ 24. In matters of *Account*, the Courts seem also to be approximating. Formerly the Equity Courts were furnished with a machinery called the Master's Office for taking accounts and deciding on other interlocutory references. But this process was productive of such cruel delay and ruinous expense to Suitors, that the office of Master has been abolished, and the Chief Clerks of the Equity Judges now take the accounts in Chambers. The old Common Law action of 'Account' on the other hand has lately been had more recourse to; and I see no reason why the Courts of Law should not themselves take the account on a judgment '*Quod computet*,' just as Equity Judges do now.

§ 25. These are so many approximations to the final amalgamation of the 'sides' of Westminster Hall. In this country, our Mofussil Courts are all Courts of Equity, and it is incumbent upon the Judges

(g) 2 White and Tudor's Leading Cases in Equity, p. 429.

(r) 2 Jur. 2, 5, § 173.

(s) 1 DeG and § p. 1.

(t) See Lord Eldon, in *Goodenough v. Powell*, 2. Russ. 229.

\* Where there is a clear matter of Law, I take it to be very much the duty of this Court to give its opinion on that matter of Law. To ask the Court of King's Bench a question of Law, which this Court could itself answer in the first instance, is not the best mode of disposing of a suit in equity."

to make themselves masters of the principles of Equity. In Courts of Common Law, especially where there is a Code of substantive Law, it is possible that a Judge by a mere technical knowledge of the Code, might declare what the Law was, by a mere reference to the Code, just as a scholar refers to a Lexicon for any information which he has occasion to search for : and indeed the Vakeels are generally apt enough at thumbing the pages of the Regulations and Circular Orders ; but where the Courts of a country are all Courts of Equity, and where there is not only no Code, but scarcely any written *substantive* Law, it is obvious that those who preside in the judgment seat must learn what Equity is. For *Summum jus summa injuria* ; and it can only be tempered and corrected by Equity.

§ 26. A man may be a respectable common Lawyer without having any knowledge of Equity, or at the best a superficial : for if he is master of *Lex Scripta*, it may suffice for him in each case to say, *Ita lex scripta est*. But a man cannot be a great Equity Lawyer without a full knowledge of the Common Law ; for Equity presupposes the existence of such knowledge and is founded upon it ; it is the harshness of the Common Law which Equity undertakes to temper.

§ 27. This 'Equity' must ever exist, even where the most perfect Code of Laws has been framed ; for the Legislator never can provide for every special case to which the complication of human affairs gives rise. He cannot foresee or even conjecture them : for there probably never were two cases precisely identical in every one of their particulars. Hence the Legislature can only lay down *general* rules or Laws : and Equity has been well defined by *Aristotle* 'the correction of that wherein the Laws by reason of its universality is deficient.'<sup>(\*)</sup> He calls it *ἐκπαισθημα νομοῦ ἢ ἀλλεῖπει διὰ τὸ καθόλου*.

The whole of the fifth Book of the Nicomachean Ethics should be studied by every one whose business it is to master the science of legal judgment ; and indeed a part of the tenth Chapter is so precisely in point that it must be quoted here.

" 'The equitable' is just, being better than a certain kind of 'just ;' and it is not better than 'the just' as though it were of a different

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(\*) Nicomach : Ethics. l. 5. C. X. Many writers have followed and indeed taken this definition without acknowledgment. We find it in Cicero, Plowden, Grotius, and others.

genus. Just and equitable, therefore, are identical ; and both being good, 'the equitable' is the better. The cause of the ambiguity is this, that 'the equitable' is just, but not that justice which is according to Law, but the correction of the legally just. And the reason of this is, that Law is in all cases universal, and on some subjects it is not possible to speak universally with correctness. In those cases where it is necessary to speak universally, but impossible to do so correctly, the Law takes the most general case, though it is well aware of the incorrectness of it. And the Law is not, therefore, less right ; for the fault is not in the Law, nor in the Legislator, but in the nature of the thing ; for the subject matter of human actions is altogether of this description.

"When, therefore, the Law speaks universally, and something happens different from the generality of cases, then it is proper that where the Legislator falls short, and has erred, from speaking generally, to correct the defect, as the Legislator would himself direct if he were then present, or as he would have legislated if he had been aware of the case. Therefore the equitable is just, and better than some kind of 'just' not indeed better than the 'absolute just,' but better than the error which arises from universal enactments.

"And this is the nature of 'the equitable' that it is a correction of Law, wherever it is defective owing to its universality. This is the reason why all things are not according to Law, because on some subjects it is impossible to make a Law. So that there is need of a special decree : for the rule of what is indeterminate, is itself indeterminate also ; like the leaden rule in Lesbian building ; for the rule is altered to suit the shape of the stone, and does not remain the same ; so do decrees differ according to the circumstances."

So the *Roman Law* said,<sup>(v)</sup> *neque leges neque senatus-consulta ita scribi possunt, ut omnes casus, qui quandoque inciderint, comprehendantur ; sed sufficit ea quæ plerumque accidunt contineri.*

So Lord *Ellesmere* says,<sup>(w)</sup> "Law makers take heed to such things as may often come, and not to every particular case, for they could not though they would." And so Lord *Bacon* in his argument on the jurisdiction of the *Marches* said—"There is no Law under heaven which is not supplied with Equity, for *summum jus summa injuria*, or as some have it '*summa lex summa crux* ;'<sup>(x)</sup> or as it otherwise expressed, *Apices juris non sunt jura.*

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(v) Digest. lib. 1. tit. 3. l. 10.

(w) See 1. Spence. E. T. 412. Note f.

(x) 1. Font Eg. B. 1. S 3 Note h.

§ 28. But it is not to be supposed that Equity is unbounded in its correction of the deficiencies of positive Law. I have already shown that the Equity Judge is bound by the same general rules of construction and interpretation as the Common Law Judge. Further, there must always remain after the fullest stretch of Equity, many cases in which though injustice may have been done, no redress can be given. This happens in cases of what are called imperfect obligations; such as a man is morally bound to perform *in foro conscientia*, but for which he is not amenable *in foro legis*. Such are the duties of charity, gratitude, benevolence, the fulfilment of promises for which no consideration has been given, the *nudum pactum*<sup>(y)</sup> of the Roman Law, and the like. Here we pass from the province of legislation and jurisprudence to that of Ethics: from the office of the judge to that of the moralist; from the tribunal of man to that of God. I have endeavoured to explain this in my Inaugural Lecture, to which I must refer those who wish to pursue this subject further.

“ ‘Mere moral feeling’ said Lord Denman<sup>(z)</sup> C. J., in a recent case, ‘is not enough to affect the legal rights of parties’ nor says Mr. Broome<sup>(a)</sup> can a subsequent express promise convert into a debt that which of itself was not a legal debt; and although the mere fact of giving a promise creates a moral obligation to perform it, yet the enforcement of such promises by Law, however plausibly justified by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors.”<sup>(b)</sup>

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(y) See Broomes L. M. p. 583. 2nd Ed.

(z) *Beaumont v. Reeve*, 15 L. J. Q. B. 141.

(a) See the Cases there.

(b) On the question what consideration will support a promise, see *Lampleigh v. Brathwaite*. 1 Sm., L. C. 118. et ibi notas. It must suffice here to state that “any benefit accruing to him who makes the promise, or any loss, trouble or disadvantage undergone by, or charge imposed upon him to whom it is made, is sufficient consideration in the eye of the Law to sustain an action.” (Smith on Contracts, p. 88.) It is almost superfluous to notice that the bare fact of benefit arising to the party making the promise, will not suffice if the promise is the result of fear. It may be a benefit to a man that a highwayman who draws a loaded pistol from his heart, but a promise to pay money to induce the robber to do so will not be binding; for there is no legal consideration to support it. In *Jones v. Ashburham* (4 East 464) Lord Ellenborough commenting on the case of *Quirk v. Coppleton* says:—

“It is stated that the defendant’s late husband was indebted to the plaintiff, and that she (not stating her to be clothed with any representative character) about to come to London, and being in

§ 29. Though I have confined attention to the different methods of operation between Common Law and Equity, it must not be supposed that they do not administer very different sorts of substantive Law, even upon the very same subject matter. The conflict between the two is often very striking, and the following example taken from a Report of the Committee of the Law Amendment Society on the Law affecting the property of married women puts this in a very striking light.

*Conflict between Law and Equity.*

LAW.

1. "By the common law the wife has no property of her own; her personal estate absolutely, and her real estate during coverture, are her husband's."—Per Lord Mansfield.

2. "By the common law the wife has no separate power of contracting. She can neither sue nor be sued."—Per Lord Mansfield.

3. "Marriage is an absolute gift to the husband of the goods, &c. of

EQUITY.

1. "Every kind of property, including estates in fee-simple and chattels personal, may be subject to a trust for the wife's separate use, which will be supported in equity."

"She may dispose of such property as if she were a feme sole."

"She may dispose of her savings as of the principal."

2. Equity allows a married woman to sue wherever she has a clear right. She may even sue her husband, when "there is no other way of asserting her right against him."—Per Lord Loughborough.

Being considered a feme sole in respect of her property, she may be sued on her own contract with respect to such property.

3. "If land or personalty is left to a married woman, for her separ-

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*fear to be arrested by the plaintiff, promised, &c.* Now an attempt to impose upon a person an unlawful terror, (and the threatening of an unlawful suit is as bad), can never be a good consideration for a promise to pay: yet that ground is insisted on by the Chief Justice. And as to the case there cited by him, of a mother who promised to pay, on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do; it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal; and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise, in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror."

which the wife was actually possessed at the time of marriage, and of such other goods and personal chattels as come to her during the marriage."—Lord Coke.

4. If a husband obtains a judgment for a debt due to his wife at law, he is entitled to the whole fund.

5. So with respect to a legacy, the husband may appropriate the whole, if the executor pays it him.

6. A woman, by law, cannot dispose of her property, nor make a will, without the concurrence of her husband.

7. If a wife carries on a separate trade, even with her husband's consent, he is entitled to all the profits (4 B. and Ad. 514).

8. Deeds of separation are not valid at law. (*Marshall v. Rutton*, 8 T. R.)

9. "A husband cannot give or grant any estate to his wife, either in possession, reversion, or remainder."

rate use, even without the intervention of trustees, equity secures such property for her separate use."

4. "If it is necessary to have recourse to equity, equity will compel him to secure a provision for his wife out of the fund."

5. Equity will compel a settlement in such a case.

6. She may in equity.

7. Equity gives the profits to the wife.

8. In equity "it may be considered, as at present settled, that such deeds . . . are valid." (2 Bright's Husband & Wife. —

9. "Although gifts of property by the husband and the wife are . . . void in law, yet they will be supported in equity." (Ib.)

§ 30 To say the least, the spectacle of two sets of Courts in the same country and often sitting under the same roof exhibiting such startling discrepancies, is anomalous. In this country, where Law and Equity are administered by one and the same set of Courts, we are spared this; though the Supreme Court indeed has its "Common Law" and "Equity sides," and a party may bring an action at Common Law on one side, and immediately after be restrained by injunction from prosecuting his action on another "side." The Mofussil Courts present no such conflict, but it is not the less necessary for the Judges to be well founded in the principles of Equity, because it is by the application of these

alone that they can correct the hardships which the Law by reason of its universality would otherwise occasionally work. Those principles are fixed and well understood, as fixed as the Law itself. Some of the chief will be commented on in these pages: but he who wishes to study them at large can scarcely do better than read *Domat*, if he wishes to learn how deeply subtly and comprehensively the human mind has searched the principles of Equity. This noble work of the learned Frenchman has gathered from the great repertory of the Roman Law its leading features, without the technicalities of the Roman procedure. My own impression is that whoever studies this work will feel how very unfit he was to discharge the functions of a Judge before mastering its pages.



## TOPIC THE SECOND.

### HOW EQUITY IS SUBSERVIENT TO THE LAW.

*Æquitas sequitur Legem.*<sup>(a)</sup>

§ 1. It would be a most mistaken idea to suppose that Equity sets itself above the Law. It would build up a most mischievous power if it did. The observations already made, it is hoped, will have explained to a certain extent its true nature.

“If a Court of Equity” says *Blackstone*<sup>(b)</sup> “really acted as many ingenious writers have supposed it (from theory) to do, it would be above all Law either common or statute, and be a most arbitrary Legislator in every particular case.”

In the infancy of our Courts of Equity, before their jurisdiction was ascertained and settled, ambition and the lust of power of the Chancellors, who being Ecclesiastics were ignorant of the Common Law, may have usurped somewhat too much upon the jurisdiction of the Common Law and each decision may have been considered an award *pro re natâ*.<sup>(c)</sup> And we trace this leaning in the earlier authorities.

Thus Lord *Kaimes*<sup>(d)</sup> makes Equity commence where Law ends, and his description would make it coequal with Ethics.

“It appears now clearly” says he “that a Court of Equity *commences at the limits of the Common Law, and enforces benevolence*, when the Law of nature makes it our duty. And thus a Court of Equity, accompanying the Law of nature, in its general refinements, enforces *every natural duty that is not provided for at Common Law*.”

So Sir *John Trevor*<sup>(e)</sup> says :

“Now, Equity is no part of the Law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the Law, and is a universal truth.”

(a) *Earl of Bath v. Sherwin* ; 10, Mod. Rep. p. 1. *Comper v. Comper*. 2, P. W. 753.

(b) Vol. 3, p. 433.

(c) *Ibid.*

(d) Lord *Kaimes*, p. 12.

(e) *Dudley v. Dudley*, Pre. Ch. 241.

So Chief Justice *Fanghan* said : (f)

" I wonder to hear of citing of precedents in matter of Equity. For if there be Equity in a Case, that Equity is a universal truth, and there can be no precedent in it. So that in any precedent that can be produced, if it be the same with this case, the reason and Equity is the same itself. And if the precedent be not the same case with this, it is not to be cited, being not to that purpose."

§ 2. But now these vague notions have subsided. Equity is the handmaid, not the mistress, of the Law.

" Where a rule, either of the Common or the Statute Law, is direct, says *Story*,<sup>(g)</sup> and governs the case, with all its circumstances, or the particular point, a Court of Equity is as much bound by it as a Court of Law, and can as little justify a departure from it."

Equity we have shown has the same rules of construction<sup>(h)</sup> and interpretation, and generally of evidence, as the Law. Nor can it relieve against a positive rule of Law *only because* that rule may work a hardship. *Blackstone*<sup>(i)</sup> lays down many instances of this but it may be well to caution the student as to the modification of this dictum by the more recent practice of our Chancery Courts. *Spence*<sup>(j)</sup> writes as follows :

" Sir *William Blackstone*, citing some of the instances above referred to, argues against the power of the Court to abate the rigour of the Common Law, because it has not done so in these instances and he adds that no such power is contended for ; but that such a power was exercised in the early history of the court we have the direct evidence of decrees, and no other assignable origin can be given to many branches of the jurisdiction ; and perhaps the proposition that no such power is contended for, even if confined to the present day, is rather too broadly laid down. Sir *Joseph Jekyll*, whom no one can mention but with the utmost respect, endeavoured to reconcile the conflict between the doctrines of the Court of Chancery and those of the Common Law thus : ' The discretion which is exercised here, is to be governed by the rules of Law and Equity, which are not to oppose, but each in its turn to be subservient to the other ; this discretion, in some cases, follows the Law implicitly, in others, assists it, and advances the remedy ; in others again, it relieves against the abuse, or allays the rigour of it ; but,' added that eminent Judge, ' in no case does it contradict or overturn the grounds or

(f) *Fry v. Porter*, 1. Mod. 307.

(h) 1 *Spence*, 520.

(g) *Eq : Jurisp.* § 64.

(i) Vol. 3, p. 430.

(j) Vol. I. p. 418

*principles* thereof, as has been sometimes ignorantly imputed to this Court; that is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with.' And this was the doctrine, it must be admitted, which was endeavoured to be enforced throughout the reign of King James I. But not to look farther than the doctrines of the Court of Chancery in respect to the separate property of married women, which have only been completed in our day, do they not directly contradict and overturn the principles and maxims of the Common Law? *Fleta* expressly says that a gift to a stranger for a benefit of a married woman, is *void as against the policy of the Law*. Lord Hardwicke, when pressed with the maxim of *Equitas sequitur legem*, said, 'When the Court finds the rules of Law *right*, it will follow them; but then it will likewise go beyond them; it seems hardly possible to designate even this as being short of legislative. It was equally propounded as a maxim, that the Prætors had no authority to abrogate the existing Law; but that they also equally violated this maxim can hardly admit of a doubt. *Dion. Cassius*, in reference to this subject, expressly says, (I give the Latin Translation,) '*Ne quidem jura scripta servarint sed ea mutaverint sæpe-numero.*'"

This *dictum* however begs the whole question, and sets up a clear legislative power in the Chancery Judge to correct the positive Law. The truth seems to be that where Equity finds a principle laid down by the Law, applicable in all its circumstances to a general equitable principle, or not inconsistent with it, Equity will follow that Law, even though it would not have laid down such a doctrine itself originally. Where however, says *Spence*, the remedy given by a Court of Equity is founded wholly on a principle of its own, and there is no corresponding course of procedure at Law, the Court acts on rules of its own. A good, though somewhat technical example may be taken from the rule for the administration of assets in payment of debts. *Spence* writes thus:—

"Where lands were *assigned* in trust for payment of debts, in the administration of the trust by the Court, which will be particularly adverted to hereafter, judgments, which affected land by their own strength and nature, and on which a remedy might be obtained at law, were directed to be paid according to their legal preference. Equity there followed the Law; the remedy in the Court of Chancery was what may be designated *utilis*, being merely substituted for the legal remedy which the creditor had on his judgments. But as regards debts which only affected the lands by force of a trust created for

their payment, the remedy, so far as the trust was enforced against the lands was peculiar to the Court of Chancery, there was no corresponding title or right which could be enforced at Law; accordingly the Court acted on its own rule, (of clerical invention no doubt,) that all debts were equally due in conscience, and all, of whatever rank, were directed to be paid *pro rata*, according to the amount of the debt.”(4)

§ 3. This principle receives illustration from the practice of Courts of Equity with regard to Statutes of Limitation. In words these applied to Courts of Law only; but Courts of Equity acted in analogy to them: or indeed, as Lord *Redesdale* put it, considered themselves equally bound by them, as though they were expressly made applicable. Thus in *Hovenden v. Lord Annesley*(5) he said:—

“But it is said that Courts of Equity are not within the statutes of limitations. This is true in one respect. They are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say, that Courts of Equity act merely by analogy to the statutes; they act in obedience to them. The statute of limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, &c., Equity, which in all cases follows the Law, acts on legal titles, and legal demands, according to matters of conscience, which arise, and which do not admit of the ordinary legal remedies. Nevertheless, in thus administering justice according to the means afforded by a Court of Equity, it follows the Law. The true jurisdiction of Courts of Equity, in such cases, is to carry into execution the principles of Law, where the modes of remedy afforded by Courts of Law are not adequate to the purposes of justice, to supply a defect in the remedies afforded by Courts of Law. The Law has appointed certain simple modes of proceeding, which are adapted to a great variety of cases. But there are cases under peculiar circumstances and qualifications to which, though the Law gives the right, those modes of proceeding do not apply. I do not mean to say, that in the exercise of this jurisdiction, Courts of Equity may not, in some instances, have gone too far; though they have been generally more strict in modern times. So Courts of Law, fancying that they had the means of administering full relief, have sometimes proceeded in cases which were formerly left to Courts of Equity; and, at one period, this also seems to have been carried too far. I think, therefore, Courts of Equity are bound to yield obedience to the statute of limitations upon all legal titles and legal

(4) 1 Spence Eq. Jur. p. 421.

(5) 2 Sch. and Lef. 607.

demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include Courts of Equity; for when the Legislature, by statute, limited the proceedings at Law in certain cases, and provided no express limitations for proceedings in Equity, it must be taken to have contemplated, that Equity followed the Law; and, therefore, it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also."

§ 4. So where there is no Statute, Equity acts upon the analogy of Limitations at Law. Thus, as the Law holds twenty years adverse possession a good legal title in ejectment, Equity follows, the same limitation with regard to equitable claims touching real estate. So in *White v. Parnter*<sup>(\*)</sup> it is said :

"Until lately the Judges at Westminster-Hall took a narrow view of the spirit of the statutes of limitations. They considered these statutes were only intended to protect persons, who having paid their debts were liable to be called on to pay them a second time; in consequence of the loss of vouchers. Any allusion to the existing debt (although not amounting to a promise to pay it) was held to keep alive the right of action for the recovery of it. A cunning person could easily draw from an ignorant debtor just such an allusion as would satisfy the Courts, and no more, or if by chance some explanation or qualification accompanied the allusion, these were forgotten, and the allusion only was proved. It was always impossible that any one could be called to contradict the witness, in support of the claim. The protection which the statutes intended to give was thus entirely taken away. The Courts of Law have now overturn the early decisions, as being contrary to the words and spirit of the Act; and the Legislature has gone farther than the Courts of Law could, by declaring that no verbal promise should prevent a claim from being barred by the statutes of limitations.

"The statutes of limitations are Laws of peace and justice: when property has been so long in the possession of a family, that it has passed to the children and grandchildren of those who first acquired it and they, unconscious of any defect of title, have formed their habits and plans of life according to the income that the property produces, it would be cruel to deprive them of it. The members of the family from which it came (never having enjoyed it) suffer but little from its loss. After a great lapse of time it is impossible to get at truth, so as to do justice upon any case. You have some documents, but you may not have all that relate to the title, and, those which are lost

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(\*) 1. Knapp. p. 227.

might have explained or perhaps done away entirely the effect of those which remain. Although some documents may be preserved, the witnesses necessary to make the account of the transaction complete and for a decision, cannot. These were the reasons why the Legislature passed the statutes of limitation, and they bear directly on the present Case.

"The Court of Chancery has adopted the limitations which have been imposed on legal remedies; and wherever a Court of Common Law will presume that a debt is satisfied, unless there be some circumstance to relent this presumption, a Court of Equity will act on the same presumption. If nothing has been done under a judgment for twenty years, a Court of Common Law will presume that it is satisfied."

And in *Smith v. Clay*<sup>(\*)</sup> Lord Camden said:

"A Court of Equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing.

"Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court.

"Therefore in *Fitter v. Lord Macclesfield*, Lord North said rightly, "That though there was no limitation to a bill of review, yet after twenty-two years, he would not reverse a decree but upon very apparent error." '*Expediit reipublicæ ut fit finis litium*,' is a maxim that has prevailed in this Court in all times, without the help of an act of parliament.

"But as the Court has no Legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as Parliament had limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied to similar cases in Equity. For when the Legislature had fixed the time at Law, it would have been preposterous for Equity, (which, by its own proper authority, always maintained a limitation) to countenance laches beyond the period, that Law had been confined to by Parliament. And therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

So Lord Redesdale in *Bond v. Hopkins*<sup>(o)</sup> says:—

"Nothing is better established in Courts of Equity, (and it was es-

(\*) 3 Br. Ch. C. 620.

(o) 1 Sch. and Lef. 429.

established long before this Act), than that where a title exists at Law and in conscience, and the effectual assertion of it at Law is unconscionably obstructed, relief should be given in Equity; and that where a title exists in conscience though there be none at Law, relief should also, though in a different mode, be given in Equity."

§ 5. Other instances may be cited. If a mortgagee has been in possession twenty years without acknowledging the mortgage, a foreclosure will be presumed. If the mortgagor has been in possession<sup>(p)</sup> for twenty years without acknowledging the mortgage debt<sup>(q)</sup> payment will be presumed. If a judgment creditor has lain by for twenty years and his debt has not been acknowledged, it will be presumed to be satisfied.

§ 6. "A defence peculiar to Courts of Equity," says *Story*<sup>(r)</sup>

"Is that founded upon the mere lapse of time, and the staleness of the claim<sup>(s)</sup>, in cases where no statute of limitations directly governs the case. In such cases Courts of Equity act sometimes by analogy to the Law; and sometimes act upon their own interest doctrine of discouraging, for the peace of Society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights."

So in *Cholmondely v. Clinton*,<sup>(t)</sup> Sir T. Plumer says:—

"In the Courts of Equity in this country the principle has been always, as I shall hereafter show, strongly enforced. They have refused relief to stale demands, even in cases where no statutable limitations existed<sup>(u)</sup>; and whenever any statute has fixed the period of limitations, by which the claim, if it had been in a Court of Law, would have been barred, the claim has been by analogy confined to the same period in a Court of Equity."

And after observing on the cases, he continues—

"These Cases show, first, that Courts of Equity have at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands, where the party has

(p) "As mortgagee," for when a mortgagee, in possession 6 years, purchased the interest of a tenant for life, and continued in possession 20 years longer, it was held that such possession was not adverse during the existence of the life estate. *Hyde v. Dallenway* 2 Hare 523.

(q) The recent statute of Limitations, 3 and 4 Will. 4, c. 27, § 28, bars the remedy,

(r) 2 Eq. Jur. § 1520. (s) See *Humble v. Humble* 24 Beav. 535. (t) 2 Jac. & W. 138—52.

(u) After 30 years a Bill for payment of a legacy was dismissed on the ground of laches—the Defendant admitted that the legacy had never been paid and the answer did not set up the statute of Limitations. *Patterson v. Hawkesworth*, 10 Beav. 375. Account denied after 30 years, *Morris v. Morris*, 4 Jur. n. s. 964.

slept upon his right, and acquiesced for a great length of time<sup>(v)</sup>; and secondly, that whenever a bar has been fixed by statute to the legal remedy in a Court of Law, the remedy in a Court of Equity has, in the analogous cases, been confined to the same period. I should not have thought it necessary to cite authorities upon points so long and so clearly established, had not the present decision tended, as it appears to me it does, to call them in question; and had it not been of such transcendent importance, that no doubt should exist upon questions so materially affecting the titles to real property."

So in the Case of *Grenfell v. Girdleston*<sup>(w)</sup> upon a bill filed by a judgment creditor to obtain the benefit of a judgment entered up and docketed twenty-eight years before, since which time no steps appeared to have been taken to enforce payment, it was held that the Plaintiff was debarred from all relief in Equity by lapse of time alone; independently of the question whether satisfaction of the judgment could or could not be *presumed*.

§ 7. I shall find another opportunity of considering that class of cases in which Equity will *remove* a statutory limitation.<sup>(x)</sup> At present I am showing where and how Equity *follows* the Law. It will not follow it *subserviently*; and therefore where to uphold a limitation would be a fraud, or in furtherance of fraud, though the Judges of Courts of Law are bound by their oath to obey the strict letter of the positive Law, a higher principle intervenes in Equity, which decides that even the positive letter of the Law shall not be taken advantage of.

So in *Bond v. Hopkins*, the time during which a party was in wrongful possession of an estate, the evidence of title to which he had wrongly obtained, was not allowed to count against the rightful owner under the statute of limitations.

"One acknowledged principle" said Lord *Redecliffe*, "on which Courts of Equity give relief, is to prevent an advantage gained at Law from

(v) But where a Company did not discover and had not the means of discovering the correctness of entries by its Agent, it was held not to be precluded by lapse of time from showing that the entries were erroneous and fraudulent, and an account was directed after a period of 25 years. *Starston v. The Carron Company*, 27 L. J. n. s. 69. s. c. 3 Jur. n. s. 1235.

(w) 2. X. & C. 662.

(x) The 21 James 1 c. 16 did not apply to Equity but the 3 and 4 Will. 114, c. 27, § 24 does. Sec. 25 applies to express trusts—and in *Teesd v. Beere* 5 Jur. n. s. 381, the Court held that the Statute did *not* apply when the debt accrued in consequence of a violation of confidence. That was a case of embezzlement by the clerk whose estate was sought to be administered.



being used against conscience. There are two modes by which the Court gives relief in such cases; one direct, the other indirect: in the first mode, it acts by giving of itself full relief; in the second, by enabling the party to try his title at Law, without the impediments which may against conscience be opposed at Law to his proceedings. Many instances of these may be put; a person having a right in Equity may not have a right to bring an action at Law. He may be compelled to come into Equity to obtain leave to proceed at Law in the name of the person having the legal right. So, a party may have a title at Law, if temporary bars were out of the way; it happens frequently from the complication of titles to lands, especially in this country, (where such titles are generally much more complicated than in *England*;) that the true question cannot be got at at Law, without the interference of a Court of Equity, or the agreement of the parties. Whether this Court will interfere to take from one in favour of another that which would be a defence at Law, depends on what is called good conscience. In this country the registry act prevents the discussion of questions on equal equities which often arises in *England*; as for instance, in *England*, a later incumbrancer without notice may gain an advantage at Law over a former; and a Court of Equity does not consider itself warranted to take away his advantage: a satisfied term may protect the inheritance, and it is the custom to procure assignments of such: and a *bonâ fide* purchaser is allowed to use it for his protection, if in point of conscience he ought to use it: that is, if he be a purchaser without notice. And in the present case, it is not disputed that temporary bars ought to be put out of the way: but it is said that the bar arising from lapse of time ought not to be removed; why not as well as a satisfied term, if used against conscience? But it is contended that the bar arising from the statute of limitations ought not to be removed, because the enactment of the statute is positive. The answer is, the positive enactment has nothing to do with the case. The question is not, whether it shall operate in a case provided for by the positive enactment of the statute, but whether it shall operate in a case not provided for by the words of the act, and to which the act can apply only so far as it governs decisions in Courts of Equity: that is, whether it shall prevent a Court of Equity doing justice according to good conscience, where the equitable title is not barred by lapse of time, although the legal title is so barred."

So in *E. I. Cy. v. Campion*<sup>(y)</sup> Lord *Cottenham* said:

"The case of *Pulteney v. Warren*, which was urged at the bar on

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<sup>(y)</sup> 11 Bligh. p. 153. 2 *Story*, p. 679. Note 1.

behalf of the Respondent, and which I had occasion lately to consider, together with several others, established only this principle, that where a party applies to a Court of Equity, and carries on an unfounded litigation, protracted under circumstances, and for a length of time, which deprives his adversary of his legal rights, the Court of Equity considers that it should itself supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party so prosecuting an unfounded claim has deprived his adversary. It was upon that principle that Lord Eldon made the order in *Pulteney v. Warren*, because there a party had, by litigation, improperly deprived his opponent of his legal remedy. It is for such reason that a Court of Equity will give a party interest out of the penalty of a bond, where, by unfounded litigation, the obligor has prevented the obligee from prosecuting his claim at the time when his legal remedy was available. Upon that principle it is that when a party, by unfounded litigation, has prevented an annuitant from receiving his annuity, the Court will, in some cases, give interest upon the annuity. All those cases depend upon the same principle of Equity."

§ 8. Another class of illustrations not of so much applicability in the country is to be found in the cases in which Equity treats executed Trust Estates analogously to Legal Estates in Courts of Law. The incidents, properties and consequences of the Estates, says *Story*,<sup>(\*)</sup> are the same.

"The same restrictions are applied as to creating estates, and bounding perpetuities, and giving absolute dominions over property. The same modes of construing the language and limitations of the trusts are adopted."

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(\*) 1 Eq. Jur. § 56 a.

## TOPIC THE THIRD.

WHERE THERE IS EQUAL EQUITY, THE LAW MUST PREVAIL.<sup>(a)</sup>

“ *When Equity is equal between the parties, a legal title must prevail.*”

*Ashurst J. in Caldwell v. Ball, 1 T. R. 214.*

§ 1. This maxim is in itself a further illustration of the principle that Equity is subservient to the Law ; for where the equities are equal on either side, the Law is left to take its ordinary course. Equity remains balanced and neuter.

§ 2. It is on this principle that Equity refuses to relieve against a *bonâ fide* purchaser for valuable consideration, without notice, express or implied, of the adverse title, when the purchase is not made pendentlite<sup>(b)</sup> For *in æquali jure melior est conditio possidentis.*<sup>(c)</sup>

§ 3. Thus a distinction has always been drawn between cases of *præmium pudicitie*, where the woman seeks to enforce the security given ; which will not be permitted, because the contract is void as *contra bonos mores* ; and where the woman is resisting the restitution of property already conveyed to her. Here the rule *conditio possidentis* applies. The English Law directly follows the Roman. Story collects the instances.

(1) Where the turpitude is on the part of the receiver only ; and there the rule is, *Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest.* Dig. Lib. 12, tit. 5, l. 1, § 2. (2.) Where the turpitude is on the part of the giver alone ; and there the rule is the contrary. *Cessat quidem conditio, quum turpiter datur.* Pothier, Pand. Lib. 12, tit. 5, art. 8. (3.) Where the turpitude affects both parties ; and there the rule is, *Ubi autem et dantis et accipientis turpitude versatur, non posse repeti dicimus ; veluti, si pecunia detur, ut male judicetur.* Dig. Lib. 12, tit. 5, l. 3. Pothier Pand. Lib. 12, tit. 5, n. 7. The reason given is ; *In pari causa possessor potior haberi debet.* Dig. Lib. 50, tit. 17, l. 128. Pothier, Pand. Lib. 12,

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(a) 1 Fonbl. B. 1 ch. 4 § 25. Note ib Ch. 5. § 2. ib. B. 6 ch. 3. § 3. Note 11 ib. B. 3. ch. 3. § 1 Mitford 274. 1 T. R. 214.

(b) See *Bassett. v. Norworthy.* 2. Tud. and W. L. C. in Eq. : p. 1.

(c) See Broome's Legal Max : 561.

tit. 5, n. 7. Several other examples are given under this head. Item, is ob stuprum datum sit; vel si quis, in adulterio deprehensus, redemerit se, cessat enim repetitio. Item, si dederit fur, ne proderetur; quoniam utriusque turpitude, versatur, cessat repetitio. Dig. Lib. 12, tit. 5, l. 4. Pothier Pand. Lib. 12, tit. 5, n. 7. Cum, te propter turpem causam contra disciplinam temporum meorum domum adversariæ dedisse profitearis; frustra eam tibi restitui desideras; cum in pari causa possessoris conditio melior habeatur. Cod. Lib. 4, tit. 7, l. 2. Pothier Pand. Lib. 12, tit. 5, l. 7. Sed quod meretrici datur, repeti non potest. Sed nova ratione, non á, quod utriusque turpitude versatur, sed solius dantis; a new reason, which Pothier, as well as Ulpian, seems to doubt. See Dig. Lib. 12, tit. 5, l. 4, § 4. Pothier, Pand. Lib. 12, tit. 5, n. 7 and note (6). On the other hand, when the money had not been paid, or the contract fulfilled, the Roman Law deemed the contract void. Quamvis enim utriusque turpitude versatur, ac solutæ quantitatis cessat repetitio, tamen ex hujusmodi stipulatione, contra bonos mores interposita, denegandas esse actiones juris auctoritate demonstratur. Cod. Lib. 4, tit. 7, l. 5; Pothier Pand. Lib. 12, tit. 5, n. 9.

The principle is the same where both parties are equally in fault. *In pari delicto melior est conditio defendentis.*

"If," said Buller J. in *Munt v. Stokes*(d), "a party come into a Court of Justice to enforce an illegal contract, two answers may be given to his demand: the one that he must draw justice from a *pure fountain*;(e) and the other, that *potior est conditio possidentis*."

Or, in the words of the Digest(f) *Cum par delictum est duorum, semper oneratur petitor et melior habetur possessoris causa*. Therefore, in a case in which I was concerned in the Supreme Court, where an Insolvent Debtor, who, with a view to defraud his creditors, had masked his property, by placing it in the hands of a third party, nominally for valuable consideration, but really upon a secret trust to restore it, sued his Trustee after his discharge under the Act,

(d) 4 T. R. 584 and See *Gordon v. Howden*, 12 Cl. & F. p. 241. Note.

(e) Here we come upon the traces of other maxims. *Nemo audiendus est allegans suam turpitudinem*.—The plaintiff must come into Court with clean hands.—He that hath committed iniquity shall not have Equity—*Ex dolo malo non oritur actio*, &c. See Broome's L. M. But though *Nemo allegans suam turpitudinem audiendus est*—when the act—be it a fraudulent sale or gift—is complete; yet if the transaction is not concluded in law, he is not precluded from disclosing the real circumstances of the transaction. So where a trader in difficulties gave possession of his goods to B and granted him a Receipt for the purchase money, it was held that the receipt not being conclusive, he was not estopped from shewing what the transaction really was and that he was entitled to recover, *Bowles v. Foster*, 4 Jur. n. 1. 95.

(f) Dig. 50. 17. 54.

for recovery of the property, which the Trustee declined to deliver up, the Court refused to interfere; for the Trustee was in possession; and if he was a rogue, the Plaintiff was as bad; he was *particeps criminis* and *in pari delicto*, though the creditors would have had a right to set aside the transaction as fraudulent. In the Roman Law this was done by the *Paulian* action.<sup>(g)</sup>

§ 4. But observe here a distinction between cases in which both parties are *participes criminis* in transactions which are *mala in se* or *mala prohibita*; and cases where the agreement is void only as being contrary to public policy. In the last class, the fact that the party who seeks relief is *particeps criminis* shall not bar him. So in *Smith v. Bromley*<sup>(h)</sup> Lord Mansfield said:

“If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. if such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover, and it is astonishing that the Reports do not distinguish between the violation of the one sort and the other.”

§ 5. But it is seldom perhaps that both parties are exactly *in pari delicto*; so that the scale of justice is exactly *in equilibrio*. It usually happens that some degree of laches, negligence, or want of caution causes it to preponderate on one side or the other. And where this is so, Equity will not refuse to interfere. So in *Osborne v. Williams*,<sup>(i)</sup> it was laid down,

“The Rule, ‘*In pari delicto melior est conditio possidentis*,’ preventing suit, is not universal; admitting Degrees of Guilt by concurring in the same criminal Act.

“Therefore against a private Agreement, obtained by a Father from his Son, in derogation of an allowed Sale of the Command of a Post-Office Packet by the former to the latter, an Account was decreed.”

§ 6. The test for determining whether the parties are in *pari delicto* is, to consider whether the Plaintiff can make out his case otherwise than through the medium of the illegal transaction to which he was a party. So in *Simpson v. Bloss*<sup>(j)</sup> where A. laid

(g) See the cases at Law and Equity collected 1 Story, Eq. Jur. § 298 Note 3.

(h) Dougl. 697. a note 3.

(i) 18 Ves. p. 379.

(j) 7. Taunt. 246.

an illegal wager with B., in which C. agreed with A. to take a share; B. lost the wager, and A., in expectation that B. would pay the amount on a certain day, advanced to C. his share of the winnings. B. died insolvent before the day, and the bet was never paid; it was held, that A. could not recover from C. the sum thus advanced.

"The Plaintiff" observed *Gibbs*, C. J., "says the payment was on a condition which has failed, but that condition was that B., who was concerned with the plaintiff and defendant in this illegal transaction, should make good his part by paying the whole bet to the plaintiff, and it is impossible to prove the failure of this condition without going into the illegal contracts, in which all the parties were equally concerned. We think, therefore, that the plaintiff's claim is so mixed with the illegal transaction, in which he and the defendant, and B., were jointly engaged, that it cannot be established without going into proof of that transaction, and therefore, cannot be enforced in a Court of Law."

So a Bill to be relieved from a security, 1st, on the ground that it was given for an immoral consideration, and 2ndly, because it was not drawn in conformity with the agreement between the parties cannot be sustained. "I consider" said Lord *Langdale*—

"That this Court has authority to relieve against an Instrument, which though legal on the face of it, was in fact executed for an illegal and immoral purpose; but where a party, to the illegal and immoral purpose comes himself to be relieved from the obligation he has contracted in respect of it, he must state distinctly and exclusively such grounds of relief as the Court can legally attend to—he must not accompany his claim to relief, which may be legitimate, with claims and complaints which are contaminated with the original immoral purpose. In this Bill the Plaintiff claims relief in part at least upon the ground that he is released from his obligations by the woman having ceased to live an immoral life in connection with him—and I am of opinion that upon a Bill so framed the Plaintiff can have no relief."

*Batty v. Chester*<sup>(k)</sup>.

So in *Fivaz v. Nicholls*<sup>(l)</sup> it was held that one joint wrong doer cannot maintain an action against another for an injury arising out of the illegal transaction in which they have been jointly engaged. There *Tindal*, C. J., said:—

"I think that this case may be determined on the short ground that

(k) 5 Beav. 108.

(l) Com. B. R. p. 501.

the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant. That is an objection that goes to the very root of the action."

§ 7. And where rights are equal, the rule *qui prior est tempore potior est in jure* may give the measuring cast. Thus suppose two inventors of the same machine; the first patent will be protected. So between two execution creditors, the writ first lodged with the Sheriff is entitled to the priority; so also of copy-right.

§ 8. On this principle of priority stands the rule, that a party in possession shall not be summarily ousted, but that he who impeaches such possession on the ground that *title* is in himself, shall establish his right before the Civil Courts of the land, before the party in possession is deprived of his possession: for he is *prior in tempore*; and *melior est conditio defendentis*. Thus Reg. V. of 1822, gives the Collector only power to determine the right to *possession* summarily; and thus when in execution of a Decree, a person is found upon the land claiming independent possession, no party to the suit in which execution is issued, and not in any fraudulent collusion with the Defendant, possession of the land cannot be given, but the Decree holder, if he questions the right of the person in occupation, must have recourse to his civil action. It may be, that the occupant has a title independent of, or paramount to, the Defendant; and this matter is new; it has never been started; the person relying on it has not been heard; the former suit is to him *res inter alios acta*, by which he cannot be bound. A forcible illustration occurs in the case of *Vasooreddy Luchmuputty Naidoo*. There, pending the Suit in which he established his rights, the East India Company had obtained possession of the lands through a sale for arrears of rent due by the Defendant in possession. The Privy Council directed the Sudder peremptorily to give effect to their decree by placing *V. Luchmuputty Naidoo* in possession of the property.<sup>(m)</sup> But the Sudder, notwithstanding, declined to interfere by any interlocutory proceeding, referring the applicant to a Civil Suit to try the right of the third parties who had in the interim obtained the land. It is true that *pendente lite nihil innovatur*, and the Company purchased with notice of the Suit; but they claimed not merely as

(m) See 4. M. I. A. p. 1. 5, 1b. p. 300.

purchasers, but by a title paramount to the Defendants ; their right to recover the arrears of Kist in whosoever's hands, the land might be when the arrears accrued. In our Court of Chancery a useful power obtains of examining such claimants summarily *pro interesse suo*, but the Sudder possesses no such power. Other instances occur frequently in practice, in which parties who have been turned out of possession summarily, have been reinstated summarily by the Sudder ; and their opponents remitted to a Civil Suit. Only this week, I obtained such an order in the Sudder (August 26, 1858) on M. P. There the petitioners had been deprived of their land by a Decree holder in a Suit in which there was filed a Razenamah. The petitioners were perpetual lease-holders ; and of course the Plaintiff could take no more than the interest of the Defendant. In point of fact he took the land subject to the lease.

These remarks may be appositely concluded by a reference to the violation of these principles in the Tanjore case, where the Commissioner caused to be zuffed every estate in the district which had at any time belonged to the late Rajah, in order to *force* the possessors to establish their titles to his satisfaction. Here the parties in possession were converted into Plaintiffs, and the E. I. Company were at once Judges and Defendants. The Euam Commissions act on the same principle.



## TOPIC THE FOURTH.

### HE THAT SEEKS EQUITY MUST DO EQUITY.

*"The principle of this Court is not to give relief to those who will not do Equity."*<sup>(a)</sup>

§ 1. From the terms of this maxim it clearly applies to the case of Plaintiffs—parties *seeking* relief: and with regard to these, Equity will not give them a Decree, unless they will consent to do that which under the circumstances of the case is equitable to the Defendant and other parties before the Court.

§ 2. Thus where a Plaintiff sues on a lost bond or other security, the Court will require him to give an undertaking not to sue at Law, or an indemnity before it decrees payment.

§ 3. So where a party came, before the repeal of the Usury Laws, to be relieved against a usurious bond, the Court would not direct the usurious instrument to be delivered up to be cancelled, except upon terms of the Plaintiff paying what was *bonâ fide* due upon it.

§ 4. So where a husband, under the English Law, seeks to recover his wife's property, and has made no settlement on her, he shall not have it without due settlement.

§ 5. So if a man prays an injunction to stay proceedings at Law upon a bond, he shall not have it unless he will give judgment, and, in England, be bound by order to bring no writ of error.<sup>(b)</sup>

§ 6. It must not be supposed that the Court will impose any terms it pleases on the Plaintiff. It will only see that he does that which is equitable to the defendant in the particular matter which is the *subject in dispute*. This doctrine has been well considered by Vice Chancellor Wigram in *Hanson v. Keating*.<sup>(c)</sup> The Vice Chancellor said:—

"The argument in this case for the Defendant Mrs. Keating was founded upon the well established rule of this Court, that the plaintiff who

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(a) Per Lord Eldon in *Davis v. Duke of Marlborough*, 2 ves. 157.

(b) Vernon, 120 *Anonymous*.

(c) 4 Hare, p. 4.

would have equity must do equity,—a rule by which, properly understood, it is at all times satisfactory to me to be bound. But it is a rule which, as it was used in the argument of this case, takes for granted the whole question in dispute. The rule, as I have often had occasion to observe, cannot per se decide what terms the Court should impose upon the plaintiff as the price of the decree it gives him. It decides in the abstract, that the Court, giving the plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject-matter of the suit;—what these rights are must be determined aliunde by strict rules of law, and not by any arbitrary determination of the Court. The rule, in short, merely raises the question what those terms (if any) should be. If, for example, a plaintiff seeks an account against a defendant, the Court will require the plaintiff to do equity by submitting himself to account in the same matter in which he asks an account;—the reason of which is, that the Court does not take accounts partially, and perhaps ineffectually, but requires that the whole subject be, once for all, settled between the parties. It is only (I may observe as a general rule) to the one matter which is the subject of a given suit that the rule applies, (*Whitaker v. Hall*<sup>(d)</sup>), and not to distinct matters pending between the same parties. So, in the case of a bill for specific performance, the Court will give the purchaser his conveyance, provided he will fulfil his part of the contract by paying the purchase-money; and, e converso, if the vendor were plaintiff, the Court will assist him, only upon condition of his doing equity by conveying to the purchaser the subject of the contract upon receiving the purchase-money. In this, as in the former case, the Court will execute the matter which is the subject of the suit wholly, and not partially. So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the Court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The Court will do this, so as to remit both parties to their original positions: it will not relieve the obligor from his liability, leaving him in possession of the fruits of the illegal transaction he complains of. I know of no case which cannot be explained upon this or analogous reasoning; and my opinion is, that the Court can never lawfully impose merely arbitrary conditions upon a plaintiff, only because he stands in that position upon

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(d) 1 Glyn & Jam. 212.

the record, but can only require him to give the defendant that which by the law of the Court, independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit. A party, in short, does not by becoming plaintiff in equity give up any of his rights, or submit those rights to the arbitrary disposition of the Court. He submits only to give the defendant his rights in respect of the subject-matter of the suit, on condition of the plaintiff obtaining his own. Cases may perhaps be suggested (some cases of retainer, for example) in which a question never can arise except against a plaintiff; but, as a general proposition, it may, I believe, be correctly stated, that a plaintiff will never, in that character, be compelled to give a defendant anything but what the defendant might, as a plaintiff, enforce, provided a cause of suit arose: *Lady Elibank v. Montolieu*<sup>(e)</sup> *Sturgis v. Champneys*.<sup>(f)</sup>

"I have gone at length into this question, because the opinion I have expressed—which I intimated during the argument—was combated with great earnestness, and was said to be opposed to the opinion of Lord Cottenham in *Sturgis v. Champneys*. I do not so understand Lord Cottenham in that case, or I should at once defer to his judgment. But I do know, that, in one of his most elaborate and able judgments,—I mean that in *Brown v. Newall*,<sup>(g)</sup> and with equal clearness in *Agabeg v. Hartwell*, in the House of Lords<sup>(h)</sup>,—he held, that a party loses none of his rights by becoming plaintiff in a suit in equity. The Vice-Chancellor of *England*, and Lord Brougham, on appeal, upon the general ground that he who would have equity must do equity, required the plaintiff in the latter cause to submit to an account of certain monies he had in his hands, in which the defendants claimed an interest, as the price of a decree for an account against the defendants; there being no necessary connexion between the two accounts. This decree, therefore, went to the House of Lords under every circumstance of disadvantage. The House of Lords investigated the case with a view to the question, whether the defendants were entitled to have the two accounts blended; and being of opinion that the defendants had no such equity, the decree was reversed.

"I am clear, therefore, that I am not bound in this case to impose upon the Plaintiff the terms required by the Defendant, only because he is Plaintiff, (for that was the argument at the bar)."

And this has been affirmed in the late case of *Gibson v. Gold-*

(e) 5 Ves. 737.

(f) 5 Myl. and Cr. 103.

(g) 3 Myl. and Cr. 558.

(h) 5 Cl. and Fin. 484, nom.

*smid*,<sup>(i)</sup> which was an appeal to the Lords Justices from a decision of the Master of the Rolls. Sir *J. Turner* quoted the argument of the Vice-Chancellor in *Hanson v. Keating* with approbation, and added—

“The case was argued at the bar, and was rested by the Master of the Rolls in his judgment, upon the ground, that the Plaintiff, seeking specific performance, must perform his part of the contract; and, in effect, the judgment of the Master of the Rolls rested upon the rule, ‘that he who comes into equity must do equity.’ This is a rule which is no doubt favoured by this Court, as its direct and immediate operation is to prevent multiplicity of suits—an evil which the Court is always anxious to avoid. But the rule certainly does not go so far as to entitle the Court arbitrarily to impose terms upon a plaintiff who may be driven to ask for its assistance; it is restricted in its operation, and the true meaning of it, as I apprehend, is this, that those who ask for the assistance of the Court must do justice as to the matter in respect of which that assistance is asked. Lord *Hardwicke*, speaking of the rule in *Shish v. Foster*<sup>(k)</sup> thus expressed himself—‘The rule does not hold throughout so as to tack things together which are independent in their own nature.’ Sir *John Leach*, in *Whitaker v. Hall*<sup>(l)</sup> distinctly stated that the rule only applied to equity arising out of the same transaction.”

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(i) 19 Jur. p. 1.

(k) 1 Ves. sen. 88.

(l) 1 GL. and Ja. 218.

## TOPIC THE FIFTH.

HE THAT HATH COMMITTED INIQUITY (TO THE DEFENDANT)  
SHALL NOT HAVE EQUITY.

*Nul prendra avantage de son tort de mesme.* 2 Inst. 713.

§ 1. The principle is that touched on already. A plaintiff must come into Court with clean hands. So in *Collins v. Blantern*.<sup>(a)</sup> Lord Chief Justice *Wilmut* said—

“This is a contract to tempt a man to transgress the Law, to do that which is injurious to the community: it is void by the common Law; and the reason why the common Law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our Law agree in this, no polluted hand shall touch the pure fountains of Justice.”<sup>(b)</sup>

§ 2. So if a usurious lender, the fabricator of a catching bargain with a young heir just of age,<sup>(c)</sup> and the like, come into Court for specific relief under their agreement, the Defendant may show the invalidity of the instrument, and shall have the Bill dismissed without paying anything; for the Court will never assist the wrong doer in effectuating his wrongful and illegal purpose.”<sup>(d)</sup>

§ 3. This principle will be largely illustrated under various heads hereafter. Suffice it here, without giving the cases, to remark, that upon this general principle stands the maxim *ex turpi causâ non oritur actio*, of which the maxims *ex pacto illicito non oritur actio*—*ex maleficio non oritur actio*—*ex dolo malo non oritur actio*—are but branches. They will be found explained by Mr. *Broome* in his *Leading Maxims*.—3rd Ed. p. 665.

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(a) 1 Sm : L. C. 283.

(b) See Case 47 of 1849, M. S. A. Report for 1850, p. 36.

(c) See *Chesterfield v. Jansen*, 1 T. and W. L. C. 499.

(d) *Note*.—The difference where the giver of such an instrument comes for relief from his own act.

## TOPIC THE SIXTH.

### EQUITY IS EQUALITY.

*Æquitas est rerum convenientia, quæ paribus in causis paria jura desiderat, et omnia vere eo æquiparat, et dicitur Æquitas quasi Equalitas.*—BRACTON.

§ 1. Equity is Equality ; or as it is sometimes put, delights in Equality. The remarks of Aristotle in the 5th Book of the Nichomachean Ethics should be studied, to see how Equity is Equality. So Seneca says *Prima pars æquitatis est æqualitas*. And Pothier<sup>(a)</sup> says :—

“ Equity ought to preside in all agreements ; hence it follows that in contracts of mutual interest, where one of the contracting parties gives or does something for the purpose of receiving something else as a price and compensation for it, an injury suffered by one of the contracting parties, even when the other has not had recourse to any artifice to deceive him, is alone sufficient to render such contracts vicious. For as Equity in matters of commerce consists in Equality, when that Equality is violated, when one of the parties gives more than he receives, the contract is vicious for want of the Equity which ought to preside in it.”

§ 2. Aristotle's theory that all virtue is a mean, and all vice either excess or defect, naturally led him to hold justice to be a mean, on either side of which the balance was ever oscillating ; and justice was consequently to be restored by *equalizing* the differences. Hence his notions of distributive justice being a process according to *geometrical* proportion ; corrective justice according to *arithmetical* proportion, and commutative, or retaliation, according to both. And the whole passage<sup>(b)</sup> is singularly illustrative of this maxim, that Equity is *Equality*.

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(a) See Broome's L. M. (3. Ed.) 655.

(b) This disquisition on distributive justice takes its rise from the fact that the ancient States had something to divide. Thus the Athenians, according to the innovation of Themistocles, divided their silver. Thus Rome rewarded her citizens with land, whence Colonica. Cicero in his first book “On the Laws” says “the Greek name for Law (*νόμος*) is derived from *νομω*, to distribute—that is to give every man his due.” Again he says, “There is but one essential justice which cements society and one Law which establishes this justice. This Law is right reason.”

§ 3. Thus in distributive justice<sup>(c)</sup> he argues that since the unjust is unequal, it is clear in wherever there is a more and a less, there is an equal. If the unjust is unequal, the just is equal : and since the equal is a mean, the just is both a mean and an equal. There must be two things for any thing to be equal. But since justice is both a mean and an equal, it will have to relate to things and persons ; because it is a mean, to some persons ; because it is an equal, to two things. Justice must consist therefore in at least four terms. Those to whom it is just compose two ; the things in which it is just, two more. And it is from people who are equal obtaining things unequal, or from people who are unequal obtaining things equal that disputes arise ; justice then is proportion. But proportion is geometrical which increases by multiples as for instance—

As  $2 : 4 :: 4 : 8$  ; or arithmetical which increases by addition ; E. G. As  $2 : 4 :: 4 : 6$ .

Distributive justice proceeds according to geometrical proportion. Thus if the State has 6 to divide between Tom and Dick. It will examine their respective standards of merits, and if it find that Dick has done the State as much service again as Tom, it is clear that he ought to have as much more of the 6. As Tom : Dick : :  $2 : 4$  ; but when in the act of distributing the ratio will stand thus—

As Tom :  $2 ::$  Dick : 4.

and if after the distribution Tom and his share are to Dick and his share as the whole ratio was before, distributive justice will have worked rightly and the rates will then stand

As Tom + 2 : Dick + 4 : : Tom + Dick : 6.

§ 4. Corrective justice also is a principle of Equality ; but it works by arithmetical proportion : that is strict Equality—whereas distributive justice proceeds according to geometrical proportion, that is the proportions which the persons had to the things brought in. This corrective justice applies to the ordinary transactions of mankind. Let us hear what Aristotle himself says :

“ But the just which exist in transactions is something equal, and the unjust something unequal, but not according to geometrical but arithmetical proportion ; for it matters not whether a good man has robbed a bad man, or a bad man a good man, nor whether a good

(c) Nic. Eth. L. V. Ch. 3-5. The translation in the text is that of Bohn's Classical Library.

or a bad man has committed adultery; the Law looks to the difference of the hurt alone, and treats the persons, if one commits and the other suffers injury, as equal, and also if one has done and the other suffered hurt. So that the Judge endeavours to make this unjust, which is unequal, equal; for when one man is struck and the other strikes, or even when one kills, and the other dies, the suffering and the doing are divided into unequal parts; but then he endeavours by means of punishment to equalize them, by taking somewhat away from the gain. For the term 'gain' is used (to speak once for all) in such cases, although in some it may not be the exact word, as in the case of the man who strikes a blow, and the term 'loss' in the case of the man who suffers it; but when the suffering is measured, the expressions gain and loss are used."

"So that the equal is the mean between the more and the less. But gain and loss are one more, and the other less, in contrary ways; that is, the more of good and the less of evil is a gain, and the contrary is a loss. Between which the mean is the equal, which we call the just. So that the just which is corrective must be the mean between loss and gain. Hence it is that when men have a quarrel they go to the Judge; but going to the Judge is going to the just; for the meaning of the word Judge is a living personification of the just; and they seek a Judge as mean; some call them mediators, under the idea that if they hit the mean, they will hit the just; the just therefore is a kind of mean, because the Judge is.

"But the Judge equalises, and, just as if a line had been cut into two equal parts, he takes away from the greater part that quantity by which it exceeds the real half, and adds it to the lesser part; but when the whole is divided into two equal parts, then they say that the parties have their own when they got an equal share. But the equal is the mean between greater and less, according to arithmetical proportion. For this reason also it is called *δικαιον*, because it is *διχα* (in two parts), just as if a person should call it *διχασον* (divided in two), and the *δικαστης* is so called, being as it were *διχαστης* (a divider). For when two things are equal, and from the one something is taken away and added to the other, this other exceeds by twice this quantity; for if it had been taken away from the one, and not added to the other, it would have exceeded by once this quantity only; it would therefore have exceeded the mean by once this quantity, and the mean would have exceeded that part from which it was taken by once this quantity. By this means, therefore, we shall know, both what it is right to take away from him who has too much, and what to add to him who has too little. For the quantity by which the mean exceeds the less must be added to him who has the less



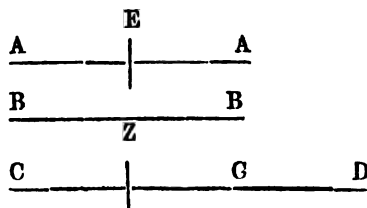
and the quantity by which the mean is exceeded by the greater must be taken away from the greatest.

"For instance, the lines AA, BB, CC, are equal to each other; from the line AA, let AE be taken, or its equal CD, and added to line CC; so that the whole DCC exceeds AE by CD, and CZ; it therefore exceeds BB by CD.(d) But these terms, loss and gain, take their rise from voluntary barter; for the having more than a man's own is called gaining, and to have less than he originally had to suffer loss; as in selling and buying, and all other transactions in which the Law affords protection. But when the result is neither more nor less, but the condition of parties is the same as before, they say that men have their own, and are neither losers nor gainers. So that the just is a mean between gain and loss in involuntary transactions, that is the having the same both before and after."

§ 5. So with respect to retaliation, or commutative justice, the rule of equality proceeds according to both proportions geometrical and arithmetical. 'Lex talionis' is far from universally being just: an eye for an eye and a tooth for a tooth, is a rule which would work in some cases very unjustly, and in others be impossible. Thus what should we say if it were proposed to apply this Law to adultery? Again; suppose a one eyed man put out the eye of a man with two eyes? Would the *Lex talionis*, the eye for an eye, which would leave the aggressor in total blindness, be equitable? Or suppose a *blind* man put out the eye of a *one-eyed* man; so that the degree of blindness would be equal, how could the law be carried into effect? But this Law is the guide in bargain and exchange, as Aristotle meant admirably shows. Again let us hear the Master's own words.

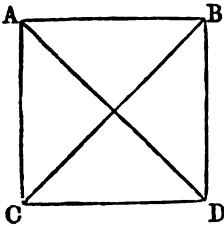
"Some people think that retaliation is absolutely just, as the Pythagoreans said; for they simply defined justice as retaliation to another. But retaliation does not fit in either with the idea of distributive or

(d) The following figure will explain Aristotle's meaning:—



corrective justice ; and yet they would have that this is the meaning of the Rhadamanthian rule. ' If a man suffers what he has done, straight forward justice would take place : ' for in many points it is at variance ; as for example, if a man in authority has struck another, it is not right that he should be struck in return ; and if a man has struck a person in authority, it is right that he should not only be struck, but punished besides. Again, the voluntariness and involuntariness of an action make a great difference. But in the intercourse of exchange, such a notion of justice as retaliation, if it be according to proportion and not according to equality, holds men together. For by proportionate retaliation Civil Society is held together ; for men either seek to retaliate evil (for otherwise, if a man must not retaliate, his condition appears to be as bad as slavery) or to retaliate good ; for otherwise there is no interchange of good offices, and by these society is held together ; and for this reason they build the temple of the Graces in the public way, to teach that kindness ought to be returned, for this is peculiar to gratitude ; for it is right to return a service to the person who has done a favour, and then to be one's self the first to confer the next. But diametrical conjunction causes proportionate return ; for example, let the builder be A, the shoemaker B, a house C, and a shoe D ; the

The following figure will explain what is meant by diametrical conjunction :—



builder therefore ought to receive from the shoemaker some of his work, and to give him some of his own in return. If therefore, there be proportionate equality in the first instance, and then retaliation take place, there will be the state of things which we described ; if not, there is no equality, nor any bond to hold commercial dealings together : for there is no reason why the work of one should not be better than the work of the other ; these things, therefore, must be equalized ; and this is true in the case of the other arts also ; for they would be put an end to, unless equality were observed between the dealer and the person dealt with, both as regards quantity and quality. For commercial intercourse does not take place between two physicians, but between a physician and an agriculturist, and generally between persons who are different, and unequal ; but it is necessary that these be made equal. Therefore it is necessary that all things, of which there is interchange, should be in some manner commensurable. And for this purpose money came into use."<sup>(e)</sup>

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(e) At the end of this Chapter he displays the most singularly correct notions respecting money ; notions which are not only the base of the disquisition of our political economists, but which have never been improved upon.

§ 6. This doctrine that Equality is Equity<sup>(f)</sup> may be traced pervading many topics in our English Law: some of which will be noticed more at large hereafter. Such for instance is the doctrine of *contribution* between *sureties*, contractors, and others—the *abatement* of legacies where the assets are deficient—the *apportionment* of money due on incumbrances, among purchasers and claimants of different parcels of land—and “*Marshelling* of the assets” as it is called.

§ 7. Thus some of the leading maxims of Equity have been noticed, with a view to give an insight into the principles on which it works. Before proceeding to discuss the principles more specifically, it may be well to advert to some of those fundamental principles by which the Judge is to be guided in the discharge of his judicial functions.

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(f) That is to say, in the absence of contract—where there is a contract between the parties the maxim *modus et conventio vincunt legem* comes into operation. To instance a few of the recent cases:—The Court compelled specific performance of an agreement to accept a transfer of railway shares though the Plaintiff himself had paid no deposit upon them. *Cheale v. Kenward* 4, Jur. N. S. 984. Specific performance was decreed of a speculative agreement though Defendant would have to pay a large sum of money for nothing. *Haywood, v. Cope*, 27 L. J. N. S. Ch. 468. So also specific performance was decreed where the agreement was that the price of certain premises should be fixed by a third party, and he fixed a very high and as the Court observed “perhaps exorbitant price.” *Collier v. Mason*, 25 Beav. 200.

## TOPIC THE SEVENTH.

### PRECEDENT AND APPEAL.

*Judicia Anchoræ Legis.*—BACON.

*Misera est servitus, ubi jus est vagum aut incertum.*—BACON.

§ 1. It is often said, as if the matter were one for boasting, that the Indian Courts are not bound by precedent.<sup>(a)</sup> If this were literally true and acted upon in practice; if each Judge could say, "I don't care what my predecessors have done, I shall follow my own course, and my opinion is so and so, &c.," it is difficult to conceive a state of things more unfortunate for the people, or more opposed to hope of progress and prosperity. Uniformity of decision begets certainty of Law, and certainty is the mother of public tranquillity. So on the trial of *Frost* for high treason; on a question of the construction of the Statutes 33 Edw. 1. and 6 Geo. 4. c. 50 as to the right of peremptory challenge, *Tindal*,<sup>(b)</sup> C. J. said:—

"We are called upon, after a construction has been put upon this act of parliament, from the very period when it was passed down to the present time, to put a different construction upon it. Where would be the certainty of the law of England? what certainty would there be for prisoners as well as for the public, if Judges, acting according to their own discretion, neglecting those rules of interpretation which wise men before them have laid down, and which have been sanctioned by invariable usage, were to do that for the first time which we are now called upon to do, namely, to put a construction different from that which has been put by all who have gone before us? It appears, however, to me that, upon the language of the act itself, it is by no means an unfair or improper conclusion to say that the Crown is not to be called upon to challenge for cause until the pannel has been gone through."

"It is better" says Lord *Eldon*<sup>(c)</sup> "the Law should be certain than that every Judge should speculate upon improvements in it."

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(a) See however *Marshman's C. G.* p. 73. l. 401-48.

(b) See *Manoell v. The Queen*, 26. L. J. n. s. Mag. Ca. p. 137. (c) *Sheldon v. Goodrich*, 8 Ves. 497

The decisions of the Law are the great landmarks for the safety and regulation of all property. And perhaps it is of less importance *how* the Law is determined, than that it should *be* determined and certain; and such determinations should be adhered to; "for then every man may know how the Law is" says *Ashurst, J.*<sup>(d)</sup> "Where things are settled, and rendered certain, it will not be so material how, as long as they are so, and that all people know how to act," says Lord Chancellor *Parker*.<sup>(e)</sup> "Certainty" says Lord *Hardwick*<sup>(f)</sup> "is the Mother of repose, and therefore the Law, aims at certainty," *Misera est servitus, ubi jus est vagum ant incertum*. It is to secure this uniformity that we have an ultimate Court of appeal; which seeks to secure unity of judgment throughout the Courts of every district. *Ubi eadem est ratio eadem est lex*. It is for this, that we have rules of practice, and circular orders put forward from time to time by the Sudder; and it is for this that each Court conforms to its own long observed course of practice. *Cursus curiæ lex curiæ* is the maxim. *Omnis innovatio plus novitate perturbat quam utilitate prodest*.<sup>(g)</sup>

"In these last three sections<sup>(h)</sup> our author," says Lord *Coke* in his commentary on *Littleton* "hath taught us an excellent point of learning, that when any innovation or new invention starts up, to try it with the rules of the Common Law (as our author here hath done); for these be true touchstones to sever the pure gold from the dross and sophistications of novelties and new inventions. And by this example you may perceive, that the rule of the old Common Law being soundly (as our author hath done) applied to such novelties, it doth utterly crush them and bring them to nothing; and commonly a new invention doth offend against many rules and reasons (as here it appeareth) of the Common Law, and the ancient Judges and sages of the Law have ever (as it appeareth in our books) suppressed innovations and novelties in the beginning as soon as they have offered to creep up, lest the quiet of the Common Law might be disturbed."

§ 2. Wherever therefore a Judge finds that the same or similar facts as those before him have already been submitted to a competent tribunal and received a judicial decision, he is bound, I conceive, or at least will act decently and wisely in holding

(d) *Goodtitle v. Otway*, 7 T. R. 419.

(f) *Wallon v. Tryon*, 1. Dick. 245.

(e) *Butler v. Duncombe*, 1. P. W. 452.

(g) *Bracton* 109.

(h) *Littleton* § 721-23.

himself bound by such decree; unless indeed it be manifestly absurd or wrong; in which case he may depart from it;<sup>(i)</sup> for it is not a servile obedience to precedent which follows blindly and unreasoningly, that is recommended; but a submission, even in cases of doubt, where the mind of the individual Judge does not go entirely along with that of his predecessor, and yet is not satisfied that his predecessor may not have been right. He will do well to hold himself bound by such precedent, and so stating in his Judgment, leave it to the suitor to refer the question to the Superior Court. The Judge in such a case will do well to bear in mind the principle, that *to doubt is to affirm*; and the admirable remarks of that great Jurisprudent, the Lord Justice *Knight Bruce*, on the duty of an appellate Judge will form a useful guide in dealing with precedents. It is, he says, an *Atty. Genl. v. Corpor. of Beverley*.<sup>(j)</sup>

"I apprehend, universally, understood to be the duty of an appellate Judge to leave undisturbed a decision where he is not thoroughly persuaded that there has been error. It is, I believe, in appeals as much a rule or maxim of the English Court of Chancery, as it was of the Civil Law, that *to doubt, to entertain grave and solid doubt, is to affirm*; because to reverse is to disturb an existing state of things. Certainly, it has not been uncommon for Judges, when reversing, to avow that they have hesitated, and to express distrust; nor, considering that sometimes, or perhaps often, the Judge appealed from is a man not less likely to be accurate than the Judge appealed to, and how often reversals and affirmances are alike reversed, does it appear to me that this can justly be blamed. But still, in whatever form, and with whatsoever sincerity terms of deference and diffidence may be used, a reversal can scarcely proceed from a Judge fit for his office without a *conviction*, in his own mind, that he is right."

§ 3. It is desirable<sup>(k)</sup> however that the practice of drawing fine wire-drawn distinctions should be avoided. The more general a rule is, the better for society. "If such distinctions," said Lord *Cowper*<sup>(l)</sup> "are to be admitted and to become rules of Law, the knowledge of the Common Law will become rather a matter of memory than

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(i) "If two texts differ" says *Yajnyasalkya* "reason," i. e. that which reason best supports, "must in practice prevail."

(j) 6 De Gex. Mac. and Gor. p. 263.

(k) And in dealing with a question of facts it may be as well to bear in mind that "suspicion though a ground for rigid inquiry" is not a ground if it remains only suspicion for an adverse decree. *Bale v. Saloon Omnibus Company*. 4 Drewry 499.

(l) *Newcomen v. Backhouse*, 2. Vern. 733.

of Judgment and reason." And *Best*, C. J. thus states that great jurist-prudent Lord *Mansfield's* opinion. "Lord *Mansfield*, speaking many years ago against subtilties and refinements being introduced into our Law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says, these should be got rid of: no additions should be made to them: our jurisprudence should be bottomed on plain broad principles, such as not only Judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of Justice to every case, and not to proceed to more fixed rules."

As Lord *Eldon*<sup>(m)</sup> says :—

"Instead of struggling by little circumstances to take cases out of a general rule, it is more wholesome to struggle not to let little circumstances prevent the application of the general rule."

§ 4. And the maxims in which this is expressed are various. Thus *Nimia subtilitas in jure reprobatur, et talis certitudo certitudinem confundit*.<sup>(n)</sup> *De minimis non curat lex. Apices juris non sunt jura.*

§ 5. Of course where the Decree produced before the Judge, is manifestly at variance with the Law, as where it professes to act upon a Regulation, and there is no such Regulation; where it has laid down doctrine opposed to Regulation which it has overlooked, or where it is demonstrably opposed to the dictates of plain sense, it should be departed from boldly and openly. It would be a mistake to suppose that the Courts in England pay an unquestioning obedience to precedents. It is only necessary to look at any Annual Index to satisfy ourselves of the number of old cases actually overruled; while others are questioned, or doubted, and so their authority weakened. "The decisions of our predecessors," says Lord *Tenterden*<sup>(o)</sup> "the Judges of former times ought to be followed and adopted; unless we can see very clearly that they are erroneous;" and again<sup>(p)</sup>, "It is of great importance in almost every case, but particularly in Mercantile Law, that a rule once

(m) *Watkins v. Lea*. 6. Ves. 641.

(n) *Broom. Leg. Max.* 141.

(o) *Selby v. Bardon*, 3. B. and Ad. 17.

(p) *Williams v. Germaine*, 7. B. and C. 476.

laid down and firmly established and continued to be acted upon for many years, should not be changed *unless* it appears clearly to have been founded upon wrong principles: when decisions are overruled, they are so not as being *bad* Law, but as *not* being Law." So of Usage. *Malus usus relinquendus est*; for it is not *usus* but *abusus*. Reason is the soul of the Law, and *cessante ratione, cessat lex*. The progress of civilization, and the increasing complication of relations in our highly artificial state of society render the application of many older dogmata of the Courts inexpedient, possibly even unjust: and the Judges of England while bowing with respectful deference as a general rule to the Precedents in the Reports, have courageously maintained their own independence of judgment in cases where such independence is based on the sure warrant of reason.

"It is the duty of the Court" says Lord Cottenham<sup>(g)</sup> "to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to."

"A decision" says *Vrihaspati* "must not be made solely by having recourse to the letter of written codes; since if no decision were made according to the reason of the law there might be a failure of justice."

And in *Darley v. The Queen*,<sup>(r)</sup> Lord Brougham says:—

"I think it is always much better when the Court is laying down a general rule for the future upon a most important question, as this is, if there is a conflict of cases, to admit at once that some cases are one way, the majority of cases being the other way, and to say that the balance of authority is on the side upon which you incline to give your own opinion, rather than to attempt by refinement and subtlety to reconcile cases which in themselves really are in conflict, and are not capable of being reconciled. It is the honestest, it is the fairest, it is the most correct course in such cases. Judges, like other men, may be fallible, and there may be better decisions given recently after full consideration than were given at a former period. It is better to admit that fairly and openly, and to say that we join in giving the weight of our authority to the side to which we think there is the balance of authorities in the Court below, than to make unavailing and unsatisfactory attempts to reconcile them."

(g) *Walworth v. Holt*, 4 M. and Cr. 685.

(r) 12 Cl. and F. 544.



Thus in *Barwell v. Brooks*<sup>(e)</sup> on the question whether a married woman could be sued for a debt on her own contract, Lord *Mansfield* observed:—

“The general principle of law is against her liability. But *quicquid agant homines* is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind. Hence, centuries ago, exceptions have been engrafted upon this rule, as in the case of adjuration,” &c.

So in *Davies v. Powell*,<sup>(f)</sup> *Willes*, C. J. said as follows:—

“When the nature of things changes, the rules of Law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep or any other cattle. Whenever they are so and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in Courts of Law and Equity, now that personal estates are so much increased and become so considerable a part of the property of this kingdom.”

§ 6. A good instance of a case solemnly overruled after being for many years the guide upon that particular point, is the well known case of *Goodsall v. Boldero* selected indeed by Mr. Smith as a Leading Case<sup>(g)</sup>, which decided that an Insurance on the life of a debtor is a contract of *indemnity*, and that the insurer can only recover from the office what he may not have been paid from other sources. This has been expressly declared not to be Law in the late case of *Dalby v. India and London Assurance Company*.<sup>(h)</sup> The remarks in *Moses v. Macfarlane* in the notes to the case of *Marriott v. Hampton*<sup>(i)</sup> may be consulted with advantage on this point. “Formerly,” says Mr. *Lewin* in his admirable work on Trusts,

“It was held by the Court, that an executor might employ the assets in his trade, or lend them upon security, and he should not be called upon to account for the profits or interest. And such was the case even where money which had been lent by the Testator on good

(e) 3. Dougl. 373.

(f) Vol. 2, p. 156.

(g) 18th Jur. 1024. See also 7th Jur. pt. 2, p. 154-9, Jur. pt. 2, p. 137.

(h) 2 Sm. L. C. 326.

security was called in by the Executor for the express purpose of being re-lent by himself. The Executor, it was argued, was not bound to lend the assets, and if he did so, it was at his peril, and he was answerable for losses, and, if accountable for any loss, he was surely entitled to any gains. But Lord *North* overruled the doctrine in spite of the alleged practice of the Court for the last twenty years, and the authority of above precedents."

§ 7. But there seldom, if ever, occur, two cases in which the whole of the facts and circumstances are precisely identical. *Nullum simile idem est. Nullum simile quatuor pedibus currit*; and it is often imperative on the Judge, while acknowledging the force of the authority before him as a general rule, to *distinguish* the case under discussion from it, by showing that it differs in *particulars* which make the precedent inapplicable in fact, however closely it may seem to apply on a cursory or superficial perusal<sup>(w)</sup> Lord Justice Knight *Bruce* in the great case of *Boyse v. Rossborough*<sup>(x)</sup> makes some excellent remarks on the force of precedent.

"I say, borrowing from Lord *Eldon's* judgment in *Bar v. Whitbread* 'that I will not confine myself to the inquiry, whether a case, precisely the same has ever occurred,' or take, 'as my rule of acting that circumstance instead of the principle decided by former cases.' Why am I, without necessity and without reason, to treat the example as limiting the rule? It has been properly conceded, that the series of direct decisions establishing wills in this Court, at least those previous to 1841, cannot be set at nought, but bind as far as they extend. If so, they must be considered not as having created (which they could not), but as having obeyed Law, that is to say, unwritten Law. Up-

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(w) One very grave evil of modern days is the voluminous and ever increasing body of Reports. In *Twyne's* case (S. Sm. L. C. p. 1.) Sir *Thomas Egerton* quotes an old saw to account for the increase of a Law library.

*Quaritur ut crescant tot in orbe volumina legis,  
In promptis causa est, crescit in orbe dolus.*

Fraud no doubt assumes Protean shapes: but the Reports, as at present conducted, are unnecessarily numerous. Cases on the same point are reported over and over again; and many on points for which no authority can be needed. The hand of the Reformer is sadly wanted here; several schemes have been proposed to mitigate or remove the evil; and the publication of such works as the *Law Journal*, *Jurist*, *Weekly Reporter* has done somewhat. The *Mofussil Judge* is more fortunate in this respect than ourselves. *Laudabit vacuus* so far as his Law shelves are concerned. But it may be as well to note Mr. Baron *Bramwell's* examination before the Commissioners appointed to enquire into the arrangements for transacting judicial business. "Lord *Wensleydale*" he says "told me and my judgment goes with it that no Judge can do his duty who does not read the Reports." 3 Jur. n. s. 330.

(x) De Gex. M. & G 846.

on questions, however, of unwritten Law, the force of authorities and precedents is not confined to cases of which all the circumstances, however accidental, agree with theirs, to instances as like as *Apis Api*; but where a positive Law forbidding the extension is not shown, extends, to those which, differing in some particulars, differ in no essential circumstance, or cannot in legal reason or legal principle be substantially distinguished. We should otherwise indeed be in a dark and strange state. Lord *Coke* and a celebrated *Frenchman* of the same age say, one '*Nullum simile quatuor pedibus currit*;' the other, '*Tout exemple cloche*,' and cases are continually governed in our Courts by authorities, not, according to our vernacular phrase, upon all fours with them. In the language of a distinguished Jurist, '*Quidenim notius et certius quam exempla non restringere regulam?*' and again, '*exempla non restringunt regulam sed loquuntur de casibus crebrioribus*.' It seems to me that to accede to the defendant's view of the precedents, would be unnecessarily to cripple the power of usefully administering justice; would be practically inconvenient and theoretically wrong; would be to confound essentials and accidentals: would in effect be doing what Lord *Eldon*, in *Baz v. Whitbread*, so manifestly disapproves when he says, 'I think it better to declare that the Court will not abide by these decisions, than to overrule them in effect, professing to abide by them.'

§ 8. A course of decision sometimes fluctuates, and what was the rule at one time ceases to be so and sometimes again even reverts; in which case the Judge must follow the latest ruling. A good illustration of this is the alteration which has taken place with respect to the degree of caution which a man is bound to exercise in dealing with a bank note.

"Thus it was held by Lord *Mansfield* in *Clarke v. Shee*,<sup>(y)</sup> that when money or notes were paid '*bonâ fide*,' and for a valuable consideration, they never shall be brought back by the true owner; but where they come "*malâ fide*" into a person's hands, they are in the nature of specific property, and if their identity can be traced, the party has a right to recover."

In *Gill v. Culbitt*<sup>(z)</sup> the principle was applied by the Chief Justice, who asked whether the plaintiff had taken the bill under circumstances that ought to have excited the suspicion of a prudent man? This case overruled *Lawson v. Weston*<sup>(a)</sup> and was itself over-

(y) 1 Cowp. 197.

(z) 3 B. and C. 466.

(a) 4 Esp. 56.

ruled by *Backhouse v. Harrison*<sup>(b)</sup> in which a different doctrine was laid down, which has been since maintained by various decisions.<sup>(c)</sup> This subject is ably treated in the notes to *Miller v. Race*,<sup>(d)</sup> where it may be further pursued. In the *Bank of Bengal v. McLeod*,<sup>(e)</sup> Lord Brougham, delivering the judgment of the Court said,—

“It is admitted, on all hands, that if Macleod and Co., having the bills in their possession, had no power to endorse them, their act of endorsement would convey no title to the party taking and discounting them, any more than a forgery would do. It is equally admitted, on the other hand, that if they had the authority to endorse, their endorsement passed the property. It may be taken as also established, that whatever may have been the Law laid down in *Gill v. Cubitt*<sup>(f)</sup> and *Down v. Halling*<sup>(g)</sup> and one or two other cases, and not abandoned, at least, as far as the language went, which the Court used in some subsequent cases, is now Law no longer; and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him.”

§ 9. A Judge is not to cast aside as worthless the decision of his predecessor, because the *reasons* on which the judgment is based are not logical, conclusive, or satisfactory, or the illustrations eccentric as for instance where in a matter involving the right of the top of a wall it was suggested that the “Plaintiff might have wished to amuse himself by running along the top of the wall.” *Stedman v. Smith*. The actual point determined may nevertheless have been *rightly* determined, although the reasons given are not convincing, or are in fact not even supportable. A conclusion may be in itself right, although the premises assigned are erroneous; or it may be faultily deduced from correct premises. In such cases the point for the Judge is to see whether the *facts proved* warrant the decision arrived at; and if they do so, the judgment shall stand. The faulty reasoning may be rejected as surplusage: the Judge may supply in his own mind the line of reasoning on which the judgment may be logically supported; and the question is, whether all that is superfluous having been rejected, there is a residue sufficient to support the finding. *Utile per inutile non vitiatur* is a well known rule in

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(b) 5 B. and Ad. 1093.

(c) *Uller v. Rich*. 4 A. and E. 780. *Osborn v. Henderson*, 1 Q. B. R. 498.

(d) *Smith*, L. C. 389.

(e) *Moore v. P. C. C.* p. 37. S. C. 13 Jur. 945.

(f) 3 B. and C. 486

(g) 8 *Ellis and Blackburn*, 1.

pleading, by which all that is superfluous in the allegations may be discarded; and it equally holds good in respect to the maintenance of judgments and the practice of the Law of Evidence. A few instances may not be out of place. Thus in *Thornby v. Fleetwood*,<sup>(\*)</sup> Mr. J. Eyre said—

“I must own I have the misfortune to differ from my brother, for I think the judgment given below for the defendants was well given, and ought to be affirmed; though I must say thus much, that I do not approve of the reasons given by the Court of C. B. for that judgment.”

And in *Newton v. Cowie*,<sup>(i)</sup> Best, C. J. said—

“I will first consider this in the authorities which are to be found.

“If these are consistent we are bound by them, even although our own minds do not approve the principles on which they rest. There would otherwise be no certain rule which could be known to those who are required to conform to the Law.

“If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them.

“If our predecessors have given no reason for their judgment, or the reasons given for conflicting judgments are equally unsatisfactory, we are to put that construction on the statutes which our own unfettered judgment induces us to think the legislature intended should be put on them.”

So *Pollock*, C. B. “The decisions of the House of Lords are binding upon us but the reasons they give for them may not be so.”  
*Taul v. Jewell*.<sup>(j)</sup>

These remarks will ordinarily be of the greatest cogency with respect to the treatment of *appeals*; wherein I conceive it is the clear duty of the Appellate Court to consider whether the judgment of the Court appealed from *can* be sustained; not whether it is to be rejected because it may be redundant, rest in part on reasons which are not borne out, or rely partly on facts immaterial or not sufficiently proved by the evidence. Thus too in criminal cases, guilt or innocence is not to be assumed only because there may be discrepancies in the evidence. The question is, whether after attaching all due weight to such discrepancies, and throwing off irregularities which may have been committed during the trial, and the like, there still remains a *residuum* of trust-worthy evidence on which to sustain the finding arrived at.

(\*) 1. Str. 371.

(i) 4. Bingham 241.

(j) 4. Jur n. s. 1086.

§ 10. A Judge should not be induced to depart from precedent where it is otherwise binding, on account of any supposed hardship in the particular case. The interest of society at large is concerned in having general, certain, well understood rules, laid down and observed uniformly, on the faith of which men regulate their conduct and dealings. Every departure from this general rule works inconceivable mischief, by introducing an element of uncertainty into the body of the Law; and in proportion as this practice is suffered to prevail, becomes the confusion in the State. Professional legal men do not know how to advise their clients; distrust is introduced into the ordinary every day transactions of life: and it is better that an individual should occasionally suffer a hardship, than that the boundary marks and guide posts of the public Law should be meddled with. Both may be evils, but that to the individual is incomparably the less of the two: and between two evils the Judge should ever choose the less. "Hard cases" says Baron *Rolfe* (Lord Chancellor *Cranworth*) in *Winterbottom v. Bright*<sup>(k)</sup> "make bad Law;" and the result of a misplaced compassion may at last be such as *Bentham*, with much exaggeration though some truth, imputes to the condition of the English Law in his day. In his Book of Fallacies he writes as follows:<sup>(l)</sup>

"On the question what the Law is, so long as the rule of action is kept in the state of common, alias unwritten, alias imaginary Law, authority, though next to nothing, is everything. The question is, what on a given occasion A. (the Judge) is likely to think: wait till your fortune has been spent in the inquiry, and you will know; but forasmuch as it is naturally a man's wish to be able to give a guess what the result will eventually be, before he has spent his fortune, in the view if possible to avoid spending his fortune, and getting nothing in return for it, he applies, through the medium of B. (an Attorney,) for an opinion to C. (a Counsel), who, considering what D. (a former Judge) has, on a subject supposed to be more or less analogous to the one in question, said or been supposed to say, deduces therefrom his guess as to what, when the time comes, Judge A., he thinks, will say and gives it you."

§ 11. Rules must be obeyed: not as being that from which the Law is derived, or which gives the Law its force and effect; but

(k) 10 M. and W. 116.

(l) Pl. 1. C. 1. App. Ex. 1. Vol. 2, p. 396.

as being the compendious explanation of what the Law is, derived from the Law itself. *Regula est quæ rem quæ est breviter enarrat : non ut ex regulâ jus sumatur, sed ex jure quod est regula fiat ;* says *Paulus* ; that is a rule which concisely states the actual doctrine of the case. The Law is not taken from the rule but the rule is made by the Law. "It is not in the rule," says *Bacon*, "that we are to look for the reason of its being established ; it indicates, but does not create the Law ; *regula emittit legem, ut acus nautica polos, indicat, non statuit.*"

§ 12. There are five important precautions, writes Mr. *Phillimore*,<sup>(m)</sup> to be observed in the application of rules.

1st. "When two rules clash, the higher must prevail. Thus the Law of nature overrules an arbitrary usage. Public Law, as in the Bridge-water case, is to be preferred to private Law. "So *jura sanguinis nullo jure civili dirimi possunt.*"

2ndly. "Care must be taken that the rule is restrained within proper limits. Thus the maxim, that he who does an act in obedience to his parent, or his master, is not supposed to will it—'*velle non creditur qui obsequitur imperio patris vel domini*'—is limited to cases of physical coercion, and does not include the fear arising from mere respect. In *Micklethwaite v. Micklethwaite*.<sup>(n)</sup> Lord J. Knight Bruce says "It can seldom be right, I agree, to consider the extent of a rule as being only that of the examples of it ; but there must probably be surer and more dangerous error in stretching a rule beyond the reason for it. That is what the plaintiff, I think, seeks to do here in opposition to the maxim, as sound as it is familiar, which says, "*Nulla Juris ratio, ut æquitatis benignitas, patitur ut quæ salubriter pro utilitate hominum introducuntur, ea nos durioris interpretatione contra ipsorum commodum producamus ad severitatem.*"

3rdly. "The reason of the rule must be understood ; e. g., a man obliged to sell his property to pay his debts cannot avail himself of the rule—'*Id quod nostrum est sine facto nostro transferri non potest*' neither could the rule be cited in favour of a proprietor who was compelled to sell his land for the public benefit.

4thly. "If the letter of the rule is too severe, equity will soften it. Thus a man is bound to return what he has borrowed ; but if you lend me beams to shore up my house, I am not bound to restore them ten minutes after I have turned them to the purpose for which they were

(m) Jur. 95.

(n) 7 De. G. and J. 621.

borrowed. Neither did the Roman Law oblige a debtor to repay money on the very day when it was lent, notwithstanding the maxim—'In omnibus obligationibus in quibus dies non ponitur presenti die debetur.'

5thly. The circumstances of the case must be carefully weighed before its application is determined. It was a rule that nobody was liable for accidents, by the act of robbers, flood, fire, etc. But if the defendant was 'in morâ,' and had not returned the thing at the proper time, or if he had expressly taken upon himself the hazard of such events, this general maxim was overruled."

§ 13. Sometimes a Judge is pressed with a former decision, not on account of the point actually decided, but for some particular doctrine or expression which it contains. Here it is to be considered, whether such expressions were absolutely essential to the decision, or the reasoning on which it is supported. If not, such doctrine is extra judicial, or '*obiter dictum*' as it is called, and not binding on the Court. "These words," says Sir John Leach in *Purden v. Jackson*<sup>(e)</sup>, "are nothing more than an *obiter dictum* uttered upon a point totally different from that which the Court had then to decide." "It seems to have been a mere *obiter dictum*," says C. Baron Alexander in *Powell v. Lloyd*<sup>(f)</sup> "not called for by the case and which it was unnecessary to give." "What was dropped about it in Calvin's case was a mere *obiter dictum* thrown out by way of argument and example," says Lord Mansfield in *Rex v. Cowle*.<sup>(g)</sup>

§ 14. Courts of Equity are not bound, any more than Courts of Law, to give the reasons of their judgment. But the Courts in India are bound to state the grounds of their decision. This by Reg: II of 1802, Sec. XVI. Reg. VI of 1816, Sec. XXXVII. and the Sudder Rules of Procedure of 1st July 1855, Sec. 47.<sup>(h)</sup> Judges should be cautious in confining their observations strictly to the subject matter before them. Great masters of Law like Lord Holt may take occasion to discuss and lay down the principles of Law on an entire subject, as in the great case of *Coggs v. Bernard*.<sup>(i)</sup> respecting Bailments. But with respect to ourselves, perhaps the best limitation to brevity will be found in only guarding against obscurity. *Brevitas esse laboro; Obscurus fio.*

(e) Russ. 48.

(f) 2. Y. and J. 379.

(g) 2. Burr. 858.

(h) See also D. S. A. Sp. App. 50 and 63 of 1851.

(i) 1. Sm. L. C. p. 82.



Modern Judges are generally cautious and guarded in confining their decision to the points directly in issue. So *Willes*, C. J. said,<sup>(t)</sup> "I shall confine myself to the question before me, because I have observed great mischiefs arise from Judges giving obiter opinions." And I think the practice is a wholesome one; for *obiter dicta* and extra judicial observations frequently give rise to embarrassment never anticipated, nay, not unfrequently give a direct encouragement to litigation. An instance in point occurs in the case of *Nursima Chetty v. Cūmala Naick and Fde Fondeclair*.<sup>(u)</sup> There the Court of Sudder Adawlut in the 5th para of its first decree went out of its way to point out what should have been the form of remedy if the fraud alleged was *not* proved: and the contract was to be held valid. Accordingly no sooner was the Decree of the Court of Sudder pronounced in 1854 than a fresh suit was brought against the Zemindar for 50,000 Rupees damages, based upon this very extra judicial and unnecessary statement of the Sudder; and expensive litigation was carried on, the original Court awarding the plaintiff 40,000 Rupees damages, the Sudder reversing the decision, and declaring he was not entitled to a farthing!<sup>(v)</sup>

§ 15. Where one issue evidently goes to the root of the whole matter, and overrides all the other points in the suit; it may be made the ground of judgment exclusively: for it becomes unnecessary to determine minor points: though an observation should be made, lest it be supposed that they were overlooked. So in *Westerdell v. Dale*.<sup>(w)</sup> Lord *Kenyon* said—

"Other points have been discussed in this case, but it is not necessary to go into them at large, or to give any decisive opinion upon them now. But as some cases have been referred to on these points, I think it proper to observe, that, whenever it becomes necessary to decide those questions, those cases may perhaps deserve further consideration. It is not necessary to decide these points in this case, and therefore I avoid giving any positive opinion upon them; but as several cases have been cited, I have thought it right to throw out these doubts, lest, whenever the question should arise again, it may be supposed that I have acquiesced in these determinations."

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(t) *Willes Rep.* 666.

(u) *Sudder Rep.* for 1850 p. 34, Suit No. 49 of 50 and *ib. Rep.* for 54 p. 158, No. 15 of 54.

(v) *Sudder Decis.* for April No. 134 of 1857, *G. Fischer, Esq. v. The Zemindar of Amanikutunoor.*

(w) 7, T. B. 313.

Instead of aiming at deciding general questions, our Judges seek to furnish the materials for ultimately laying them down. Each decision is a step towards a future general principle.

"The necessary effect of the practice of the Courts, to confine a decision to the particular circumstances of the individual case" writes Mr. *Ram*,<sup>(\*)</sup> "is that the Courts step by step approach to the establishment of a general proposition. The advances to this proposition consist of the decisions on the limited questions, that from time to time occur; and consequently the speed with which it is approached, and the time it takes to attain it, necessarily depend on the nature of the subject, of which those questions are a part. Those questions may be few or many; and the times of their occurrence are certainly irregular. The origin of several particular doctrines can with much certainty be named; and although in many subjects, in which a general proposition has been attained, it is probably impossible to name the steps by which it has been approached, yet clearly it is, in many instances, not difficult to trace with considerable accuracy the progress, which a particular subject has made towards, or up to, the establishment of a general proposition.

"Particular subjects, of which the origin may be named, are,—the jurisdiction of the Court of Chancery to enforce the specific performance of agreements: the principle of compensation, in certain cases where that performance is enforced: election under a will.

"The progress, which a particular subject has made towards, or up to, the decision of a general question, is distinctly observable in the following subjects:—the admission of secondary evidence, when an attesting witness cannot be produced; the practice of the Court of Chancery to direct a sale on the words rents and profits in a will: compensation in certain cases, where the Court of Chancery enforces a specific performance of an agreement: the practice, in a suit where the Court of Chancery takes on itself the administration of assets, not to permit a creditor to proceed at Law.

"This gradual extension of a doctrine is, in two of the instances above mentioned, thus clearly pointed out by the Bench:—'It is true, that, where there is no direction for a sale, the Court [Chancery] has gone by several gradations. When any particular time is mentioned, within which the estate would not afford the charge, the Court directed a sale; and then went further, till a sale was directed on the words rents and profits alone, when there was nothing to exclude or express a sale.'"

"It is fully settled, though not from a very ancient time, that if this Court [Chancery] once takes on itself the administration of the assets of

(\*) Science of Legal Judgt; p. 148.

a testator or intestate, a creditor seeking, and not having yet obtained, satisfaction at Law shall not be suffered to proceed there; it being impossible, while the decree is considered as a proceeding for the benefit of all the creditors, to permit some of them to proceed elsewhere. That doctrine has been much enlarged even in my time, for it was first determined by Lord *Thurlow*, that such relief might be obtained, not only by a creditor, but by a residuary legatee. It is now an universal rule, that after a decree for the administration of assets, those, who make a demand which they have yet to recover against those assets, must come in under that decree."

§ 16. Though a *Dictum* is not binding, and must give way to a regular decision, it is nevertheless entitled to consideration and respect. Its weight will depend upon a variety of circumstances. I shall give the compendious observation of Mr. *Ram*.<sup>(y)</sup> "A circumstance, that may augment the value of a dictum, may be—

"That it is 'a deliberate and well-considered opinion.'"

"That it is consonant to known practice: 'I give credit to the dictum of Judge *Powys* in *Viner*, not on the authority of the reporter but because it is consonant to the known practice of Westminster Hall in other cases.'"

"That it 'is not a mere dictum, it is part of the argument, it is a main part of the argument.'"

"That as authority it has been cited on the bench: 'I must confess, that I never before heard that dictum cited as an authority; and the only claim, which it has, in my opinion, to that distinction, is the allusion to it by Mr. Justice *Holroyd*.'"

"That it is an ancient dictum, which has in several cases been cited as authority, and no case has determined it not to be Law: 'I recur to the doctrine in *Freeman*. I am ready to admit that I do not know any case deciding that proposition so largely as it is there stated. If however no decision has gone to the extent of the doctrine there stated, it may be also safely affirmed, that no case has determined it not to be Law; and it has been cited as authority in almost every case of a charity, that has since occurred. How far that dictum in *Freeman*, from its antiquity of considerable authority, is to be supported, should this [the particular] case be taken to the House of Lords, is another question; but much consideration will be required, before we can come to a conclusion against it at this day.'"

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(y) Sc. of L. Judgt. p. 47.

"That it is the dictum of a Judge of great judicial character : That [an opinion of Mr. Justice *Heath*,] is certainly entitled to great weight, as being the opinion of a very able Judge 'I thought so much respect due to the dicta imputed to Lord *Hardwicke*, as to pause upon the decision of a point, with regard to which he seemed to entertain an opinion different from that with which I was impressed.'"

"A circumstance, that may lessen the value of a dictum, may be,

"That it is void of principle.

"That it is extra-judicial : I observe that this was not the point then in question, but only an opinion of *Hobart's* declared incidentally in the argument of the case, and therefore ought to have the less weight : " The point was not in Judgment before Lord *Holt*, and therefore the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned judge : " The opinion of Judges, given upon points not before them, have certainly not so much weight, as when the points are before them : The opinion given by Mr. Justice *Heath* on this subject, in the case of *Bush v. Steinman*, was extra-judicial. It has the weight properly belonging to the opinion of a very learned Judge, but it could not be revised, and has not the authority of a judgment.

"That it is a mere dictum, which has never been followed up.

"That it is an obiter dictum only : that the words "are nothing more than an obiter dictum, uttered upon a point totally different from that, which the Court had then to decide, and by a Judge, who, in the discussion in which he uttered them, was in a minority.

"That it is an opinion at Nisi Prius only : The authority in our Law, upon which the right to glean is supported, is a dictum of Sir *Matthew Hale* in the Trials per Pais ; but though I entertain the highest respect for the authority and character of that great judge, yet it would be doing injustice to his memory, to take every hasty expression of his at Nisi Prius, as a serious and deliberate opinion : " The passage cited from the Trials per Pais contains a dictum, but not a judicial opinion, of Sir *Matthew Hale*. Every one who hears me must acknowledge the impropriety of construing all the conversation, which passes between a Judge and the Counsel at Nisi Prius, as legal decision."

"That no such doctrine is to be found in another report of the same case by a learned Judge, who joined in the judgment in that case : " It is to be observed, that no such doctrine is to be found in the report of the same case by Mr. Justice *Blackstone*, who joined in the judgment."

"That the case did not call for the proposition so generally expressed: 'In the case of *F. v. A.*, *De Grey*, C. J., indeed says, when money is paid by one man to another on a mistake either of fact, or of Law, or by deceit, this action (of money had and received) will certainly lie. Now the case did not call for this proposition so generally expressed; and I do think that doctrine, laid down so very widely and generally, where it is not called for by the circumstances of the case, is but little to be attended to; at least it is not entitled to the same weight in a case, where the attention of the Court is not called to a distinction, as it is in a case where it is called to the distinction.'"

"That the doctrine is not referred to in a judgment, in any subsequent case, to which it would apply: 'It is very singular, that in no subsequent case is that doctrine ever alluded to, or introduced, though many cases must have occurred, to which it would apply. Possibly the Courts have not thought it necessary further to consider a mere dictum; but I can find no judgment of any Court, in which the Court has referred to those dicta. In one, and only in one case, do the counsel in argument allude to them, but the Court does not notice the argument. In such circumstances, therefore, we are to look to subsequent decisions, and see how far such dicta, though coming from so high an authority, have been recognized. On the other hand, we find in previous, as well as in latter, decisions, many things which have an aspect the other way.'"

"That the proposition is not supported by the authority, which the Judge quoted for it."

"That in the decision of the case, in which the dictum occurs, the Judge who expressed it was in a minority: Lord *Lyndhurst*, estimating such a dictum, says,—'Reference is made to the dictum of Lord *Holt* in *G. v. A.* whether that dictum be or be not accurately reported, I will not undertake to say; but in the judgment, in which it occurs, Lord *Holt* differed from the rest of the Court, and the decision was contrary to his opinion.'"

"That the case, in which the dictum is found, is inaccurately reported: Lord *Lyndhurst*, citing a case on account of a dictum, which occurs in the report of the judgment, remarked, In the first place, this is a mere dictum, and was not essential to the decision of the case. It is also to be observed, that the case is most inaccurately reported. As stated in *Alkyns*, it is unintelligible; and it is only by attending to the correction of it in a note by Mr. *Cow*, that we are able to ascertain what the true facts were. I mention this circumstance for the

purpose of showing, that, in *G. v. K.*, not much reliance can be placed on the accuracy of the reporter."

"That the same Judge has expressed an opinion tending a contrary way: "Here is the opinion of a very learned Judge [Lord *Hardwicke*] not essential to the decision of the particular case, conformable to an opinion said to have been expressed by him in another case, where also it was not essential to the decision. But in considering what weight these dicta are entitled to, it is material to consider, whether the same Judge has ever expressed an opinion tending a contrary way. The opinion expressed by Lord *Hardwicke* [in *B. v. D.*] is at variance with the other dicta I have referred to; and when we are considering to what degree of respect the language, so attributed to that learned Judge, is entitled, we are justified in citing the one dictum against the other."

§ 17. Sometimes a Judge will have before him a case on which there is *no* authority; that is to say, a new case, or as it is called, a "case of the first impression." Here the Judge will have to refer to the general principles of Jurisprudence. He will search the topics of arguments from analogy, *ab inconvenienti*, (*quod plurimum valet in lege*<sup>(\*)</sup>) and the like.

"The case is said to be a new one," says Sir *John Nicholl* in *Wilson v. McMath*,<sup>(a)</sup> "so far as regards any express Law, or any judicial decision on the subject. There is no statute, no canon, no reported Judgment, either expressly affirming, or expressly negating the right. It nevertheless may exist as a part of the Common Law of the land, as a part of the *lex non scripta*, which is of binding authority, as much in the ecclesiastical as in the temporal Courts. Indeed the whole canon Law rests for its authority in this country upon received usage; it is not binding here *proprio vigore*. Moreover, this Court, upon many points, is governed in the absence of express statute or canon by the *jus tacito et illiterato hominum consensu et moribus expressum*. It is true, that generally the existence of this *jus non scriptum* is ascertained by reports of adjudged cases; but it may be proved by other means; it may be proved by public notoriety, or be deducible from principles and analogy, or be shown by legislative recognitions."

(\*) Broome, L. M. 139.

(a) 3. B. & Al. 245 note.

## TOPIC THE EIGHTH.

### BOUNDARIES BETWEEN JUDICIAL AND LEGISLATIVE FUNCTIONS.

*Judicis est jus dicere non dare.*

§ 1. Closely allied with the last Topic is the fundamental rule conveyed in the Maxim at the head of this section. It is the province of the Judge to *declare*, not to *make* the Law: a canon which leads to a consideration of the boundaries between the duties of the judicial and the legislative office.

§ 2. It cannot be denied that this separation has not always been observed; on the contrary, there are some very flagrant instances in our legal history, of decisions which not only amount to legislation, but in fact overrule and contradict the express provisions of the legislature. In *Dr. Bonham's case*,<sup>(a)</sup> Lord *Coke* lays down a doctrine which we must receive with large qualifications. He there says the Common Law doth controul acts of Parliament and adjudges them void when against common right and reason. Even Lord *Holt* in the *City of London v. Wood*<sup>(b)</sup> adopted *Coke's* dictum. But *Blackstone*<sup>(c)</sup> says truly where the common Law and a Statute differ, the common Law gives place to the Statute.

§ 3. Flagrant instances may easily be cited. *Taltarum's case*, which has excited the wrath of Mr. *Phillimore*, was unquestionably a decision setting aside a Statute. The nobility of England, with a view to preserve their estates in their own families, procured the passing of the Statute of Westminster 2nd, commonly called *De Donis Conditionalibus*: by which the will of the donor was to be observed *secundum formamdoni* from whence the term "*formedon*." Hence arose the estate known as "*fee-tail*."

The consequences of such a Law were lamentable.

"Children," says *Blackstone*, 'grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in

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(a) 8 Rep. 118.

(b) 12. Mod. Rep. 687.

(c) Vol. I. p. 90.

tail ; for if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited : creditors were defrauded of their debts ; for if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth ; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought, of suits in consequence of which, our ancient books are full : and treasons were encouraged ; as estates-tail were not liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new contentions and mischiefs unknown to the common Law, and almost universally considered as the common grievance of a realm. But as the nobility were always fond of the Statute *De donis*, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature ; and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

“ About two hundred years intervened between the making of the Statute *De donis* and the application of common recoveries to this intent, in the twelfth year of Edward the fourth, which were then openly declared by the Judges to be a sufficient bar of an estate-tail. For though the Courts had, so long before as the reign of Edward the third, very frequently hinted their opinion that a bar might be effected upon these principles, yet it never was carried into execution, till Edward the fourth, observing (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had upon families, whose estates were protected by the sanctuary of entails, contrived that *Taltarum's* case should be brought before the Court ; wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should convert his estate into a fee-simple absolute, and bar all persons whatever claiming the estate tail, or any estate ulterior thereto. What common recoveries were, both in their nature and consequences, and why they were allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present it may suffice to say, that they were fictitious proceedings, introduced by a kind of *pia-fraus*, to elude the Statute *De donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal ; and that these recoveries, however clandestinely introduced, afterwards became by long use and acquiescence a most common assurance of lands ; and were looked upon as the legal mode of conveyance, by which tenant in tail might dispose of his lands and tenelements, so that no Court would suffer them to be shaken or reflected on.”

§ 4. Another illustration may be taken from the judicial construction



put upon the Statute 27, Hen. 8, C. 10, commonly called the Statute of Uses. Uses, which answer closely to the *fidei commissa* of the Roman Law, had been largely introduced by the Ecclesiastics, to enable the pious to transfer their properties to the Church, in spite of the restrictions of the feudal Law upon alienations. This Statute aimed at "transferring uses into possession." The history of this Statute and of Uses at large, must be read in Blackstone.

"The effect of this Statute" says *Stephens*<sup>(d)</sup> "wherever it comes into operation, is to execute the use; that is, it instantaneously, and as by a kind of parliamentary magic, transmutes the equitable interest of *cestui que use* into a legal estate of the same nature, and makes him tenant of the land accordingly, in lieu of the *feoffee* to uses, or trustee, whose estate on the other hand, is at the same moment annihilated. The use is also said to be transferred into possession; that is, the legal estate conferred on *cestui que use* is considered as one in actual *seisin* or possession (according to its nature), and such as requires no farther ceremony for its completion. Thus if a *feoffment* be made to A. and his heirs to the use of B. and his heirs, an estate in fee-simple in possession is *eo instanti* vested by force of the statute, and without livery of *seisin*, in B.; and A. takes nothing; or if a person seized in fee bargains and sells to A. for a year, for a pecuniary consideration (which we may remember constitutes a *seisin* in the bargainer to the use of A., A. immediately becomes, by force of the statute and without entry, possessed of the land for the term of one year; the reversion remaining in the bargainer."

But the Common Law Judges nullified the object of the Legislature, by declaring that when this was once effected, the Statute was exhausted, and consequently where a trust or use was declared upon that first declared, as a gift to A, to the use of B, to the use of (or in trust for) C; B. took the Estate; and C. took nothing. Equity however held that the intention of the donor was to be respected, and bound B. to execute the trust and confidence reposed in him in favour of C. and thus, as it has been observed, the effect of the Statute has been to add three words ("in trust for") to a conveyance! Again, a modern instance may be found in *Sidwell v. Mason*.<sup>(e)</sup> That was a case upon the Statutes of

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(d) Comm. 1. 345.

(e) 3 Jur. N. S. 649.

Limitations<sup>(f)</sup> as to what was a sufficient acknowledgment in writing to take the case out of the Statute. *Bramwell, B.* said—

“I do think the decisions on this head of law are in a satisfactory condition. The stat. 21 Jac. 1, c. 16, s. 3, says no actions of this nature are to be brought except ‘within six years next after the cause of such actions or suit, and not after.’ It was very soon found that that enactment worked very injuriously, for persons relying on a new promise to pay were precluded from enforcing their rights after the six years; and the Courts accordingly made an innovation on the statute, by saying that the cause of action must be deemed to have accrued when the new promise was made, and that the statute should run from that time. Having taken that step they took many others, and held not only that promise would take a case out of the statute, but that evidence of a promise would be sufficient. They next said an acknowledgment of the debt, with a refusal to pay it, would be enough, which they never would have done had they considered on what principle cases are taken out of the statute at all. That was, however, set right by *Tanner v. Smart*,<sup>(g)</sup> where it was held there must be evidence of a promise to pay. How that rule ever applied to actions of debt on simple contract I cannot understand, for the cause of action there does not depend on a promise. I suppose, however, they thought, as their hands were in, they would make a complete job of it, and would not hold that a promise would take out of the Statute of Limitations in assumpsit, but not in debt.”

§ 5. The French Civil Code,<sup>(h)</sup> has a curious provision that any Judge who refuses to decide a case under pretext of the silence, the obscurity, or the insufficiency of the Law, may be prosecuted for denial of justice. This was to prevent reference to the Legislature in cases not provided for by the Code, and is in accordance with the maxim *Boni judicis est ampliare jurisdictionem*, which our Judges read ‘*justitiam*.’<sup>(i)</sup>

§ 6. The term “Judge-made” Law is one of reproach: and yet the great bulk of the Common Law of England may be said to have been so made. Where a country possesses a complete ‘*Lex Scripta*,’ all its substantive Law embodied in a Code like the *Corpus Juris Latinorum*, the Code Napoleon, and the Codes of European Continental Nations, there remains small scope for any

(f) 21 C. 2. 16. 9 Geo. 4. U. 14. (g) 6 B. and Cr. 603 (h) Tit. Prelim. Art. IV.

(i) See *Wilmut, C. J.* in *Collins v. Blantern Smith's* L. C.

*Judge-made Law.* The Judge, in applying the provisions of the Code to new circumstances before him, may mitigate its generality by an equitable construction; or in event of a new case in kind and character, the Legislature may add to the Code. Generally speaking however, the Judge has at his side a Lexicon of the Law, any page of which he can turn to consult on every particular occasion. In the strong young Colonies of the present age, a Code might be prepared, which should grow with their growth and expand with their expansions; for as the Colonist of old snatched from the altars of his God a morsel of the sacred fire, to be borne with him to his new home, so the Colonist of modern days carries forth with him from the land of his fathers the whole body of their already formed Law. But in the legal history of England there is nothing analogous to this. The Civilians, it is true, introduced the Canon Law, practised in the Ecclesiastical Courts; but neither the Courts of Common Law or Equity had any Code before them. They built up our present system decision by decision, just as a mason builds an edifice stone by stone; they declared what the Law was *pro hac vice*, as each individual case came before them. Former decisions were handed down traditionally, and subsequently in short notes or reports. When cases arose, similar in character, but differing in particulars, the Judges argued what the Law was from analogy: when no such earlier cases were forthcoming, they were driven to search the general treasures of jurisprudence for the principle of their decision. Lord Coke upon *Littleton* enumerates twenty sources for declaring what the Common Law is.<sup>(j)</sup>

“First, from the maxims, principles, rules, intendment and reason of the common law, which indeed is the rule of the law, as here and in other places our author doth use.

“Secondly, from the books, records, and other authorities of law cited by him *ab autoritate, et pronuntiatis*.

“Thirdly, from originall writs in the Register, *à rescriptis valet argumentum*.

“Fourthly, from the forme of good pleading.

“Fifthly, from the right entrie of judgements.

“Sixthly, *à præcedentibus approbatis et usu*, from approved precedents and use.

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(j) 1 Inst. 11 a.

"Seventhly, *à non usu*, from not use,

"Eighthly, *ab artificialibus argumentis consequentibus et conclusionibus*, artificial arguments, consequents and conclusions.

"Ninthly, *à communi opinione jurisprudentum*, from the common opinion of the sages of the law.

"Tenthly, *ab inconvenienti*, from that which is inconvenient.

"Eleventhly, *à divisione*, from a division, *vel ab enumeratione partium*, from the enumeration of the parts.

"Twelfthly, *à majore ad minus*, from the greater to the lesser, or from the lesser to the greater *à simili à pari*.

"*Ab impossibili*, from that which is impossible.

"*A fine*, from the end

"*Ab utili vel inutili*, from that which is profitable or unprofitable.

"*Ex absurdo*, for that thereupon shall follow an absurditie, *quasi à sordo prolatum*, because it is repugnant to understanding and reason.

"*A naturâ et ordine naturæ*, from nature, or the course of nature.

"*Ab ordine religionis*, from the order of religion.

"*A communi præsumptione*, from a common presumption.

"*A lectionibus jurisprudentum*, from the readings of learned men of law."

§ 7. Equity is in a great measure the application of the Roman Law to the necessities of English litigants: while the student of *Bracton* will be astonished to find how largely the Roman jurisprudence enters into and forms the groundwork of our Common Law. In these decisions, it is conceived that the Judges did in fact make the Law, and indeed they must have done so, or have had recourse in such particular new case to the Legislature, a course which we know they did not pursue; though in early times, as we learn from *Bracton*, if any serious doubt or difficulty presented itself, or if a case arose of first impression, it was usually adjourned into Parliament, and decided there; for the High Court of Parliament met every year or "oftener if need were for the maintenance and execution of the Laws."<sup>(\*)</sup>

§ 8. The Judges of old did this with a far bolder hand than their successors; and in truth, as the body of precedents and the known rules of Law multiplied, there was less excuse for each suc-

(\*) The language of *Bracton* is as follows :—

"Si aliqua nova et inconsecta emeruerint quæ nunquam prius evenerunt, et obscurum et difficile sit eorum judicium, tunc ponantur judicia in respectu usque ad Magnam Curiam, ut ibi per consilium curiæ terminetur."

ceeding generation of jurists indulging in any latitude. Accordingly we find statutes multiplying as we advance nearer to modern times; and the demarcation between the Judicial and Legislative functions is far better understood and acted on now than in the days of our ancestors.

§ 9. Indeed a very large margin was granted to the Judges by the Legislature itself in early times. All actions were commenced by original writ; and as these were few in number, and cases varying in particulars were of course constantly arising, the statute of Westminster,<sup>(1)</sup> provided—

“Whosoever from thenceforth in one case a suit shall be found in Chancery, and in a like case falling under the same right and requiring like remedy, no precedent of a writ can be produced, the Clerks in Chancery shall agree in forming a new one, and if they consent and agree it shall be adjourned to the next Parliament where a writ shall be framed by consent of the learned in the Law, but if it happen for the future that the Court of our Lord the King be deficient in dry justice to the suitors.<sup>(m)</sup> Hence we find writs multiplied in the *Register Brevium*; and hence arose the form of actions ‘on the Case;’ that is to say, a special action to a man on his own case.”

§ 10. The language of Judges of modern days is explicit and guarded. They repudiate the right to make the Law. In reading the Reports we frequently find the Courts saying, this is a case for which the Legislature has not provided. The Legislature alone can remedy it. Such observations most frequently occur in cases in which the construction of a Statute is in debate; and on this subject the reader must consult for himself my work on Evidence § 744-762. The true province of judicial decision seems to be laid down with great felicity by *Park, J.* in the case of *Mirehouse v. Rennell*.<sup>(n)</sup>

“The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we

(1) 13. Edward 1. C. 24.

(m) This provision is analogous to the Roman Action *De præscriptis verbis in factum*: and the Pandects contain a provision very like our own Statute of Westminster. See L. xiii. ff de præscriptis verbis. And Julian says (Pand L. xii. de Leg.) *Is qui jurisdictioni præest ad similia procedere et ibi jus dicere debet.*

(n) 8 Bing. 515. 2 *Cl. & Fin.*

have no right to consider it because it is new, as one for which the Law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our Common Law system consists applying to new combinations of circumstances, those rules of Law, which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of Law as a science."

§ 11. "*Vere dici potest magistratum legem esse loquentem; legem autem mutum magistratum*" says Cicero<sup>(o)</sup>; and Saint Augustine neatly expresses the same sentiment, "*Non licet judici de legibus judicare, sed secundum ipsas.*" Montesquieu. Esp des L. ix. C. vi.

§ 12. Our maxim is that of the Roman Law, *Optima est lex quæ minimum relinquit arbitrio judicis: optimus judex, qui minimum sibi!*

So great a stickler for strict interpretation of the Statute Law was the late Mr. Justice Maule, that he either said in his humorous way, or the saying was made for him, (parodying the well known *Fiat justitia, ruat cælum*) '*fiat jus, ruat justitia*'; for as has been often said, the Legislature is at hand to correct and supply. There is, however, a wide distinction between the adherence to the written Law, and declaring what the unwritten or Common Law is. And so in Equity, the Law is said to be *secundum arbitrium boni viri*. But when the question *Vir bonus est quis*, is asked. The answer, arguing in a circle, is still '*Qui consulta patrum, qui leges, juraque servat.*'

§ 13. Where the Legislature has granted jurisdiction, all powers essential to its exercise are implied. The celebrated maxim of the Roman Law laid this down. *Mandatâ jurisdictione, ea omnia mandata intelliguntur, sine quibus jurisdictio exerceri non potest*; and this depends upon a more general proposition still. *Quando lex*

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(o) De Legg. L. III. § 1.

*aliquid concedit, concedere videtur et id sine quo res ipsa esse non potest.*<sup>(p)</sup>

On which principle stands the right to the use of all those things without which the principal thing cannot be enjoyed, between vendor and purchaser, lessor and lessee, &c.

So if I purchase or rent a house in a park, the park itself being reserved, I am entitled by implication to a right of way across the park, without which the house cannot be approached. As to "Easements of necessity" however it must be borne in mind that "a grant arising out of the implication of necessity cannot be carried further than the necessity of the case requires."<sup>(q)</sup> This principle has received illustration in the following cases. In *Kielly v. Carson*<sup>(r)</sup> it was held that the House of assembly of the Island of Newfoundland does not possess as a legal incident the power of arrest, with a view of adjudication on a contempt committed out of the house: but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local legislature. And see *Beaumont v. Barrett*.<sup>(s)</sup>

§ 14. The French seem, from the *Discourse Preliminaire*, &c. to the Civil Code, to have had less idea than ourselves of the boundaries between Legislation and Judicial interpretation. The intention of the Legislature must, it is indisputable, be construed and interpreted by some one; and the Sovereign will has entrusted this duty to the Judges. But the French, in the passage already cited, absolutely forbid the Judges having recourse to the Legislature under penal consequences: though such a provision, in the language of *Cambaceres*, is calculated *faciliter les usurpations des tribunaux sur le pouvoir legislatif*."

§ 15. The following passage from the *Discourse Preliminaire* well defines the province of the Judge.

"En effet la loi statue sur tous: elle considère les hommes en masse, jamais comme particuliers; elle ne doit point se mêler des faits individuels ni des litiges qui divisent les citoyens. S'il en était autrement, il faudrait journellement faire de nouvelles lois: leur multitude étoufferait leur dignité et nuirait à leur observation. Le jurisconsulte serait sans fonctions, et le législateur, entraîné par les détails, ne serait bientôt plus que juris-

(p) Co. Litt. 56 a.

(q) *Holmers v. Goring*, 2 Ring. 76. See also Gale on Easements. 70.

(r) 4 Moore's P. C. C. p. 63.

(s) 1 Moore's P. C. C. p. 59.

consulte. Les intérêts particuliers assiégeraient la puissance législative ; ils la détourneraient, à chaque instant, de l'intérêt général de société.

'Il y a une science pour les législateurs' comme il y en a une pour les magistrats : et l'une ne ressemble pas à l'autre. La science du législateur consiste à trouver dans chaque matière les principes les plus favorables au bien commun : la science du magistrat est de mettre ces principes en action,—de les ramifier,—de les étendre, par une application sage et raisonnée, aux hypothèses privées ; d'éluder l'esprit de la loi quand la lettre tue ; et de ne pas s'exposer au risque d'être, tour à tour, esclave et rebelle, et désober par esprit de servitude."

§ 16. The Legislator also has his duties. "He is called upon no doubt" says Sir *Fortunatus Dwarris*,<sup>(1)</sup>

"To watch over both the jurisprudence and the judicature of his country ; to detect the deficiencies of the one, and to correct the excesses of the other. He is also to note his own miscalculations and failures, and to fill up the voids he has before left, as said by the French jurisconsults. Where there has been an omission in an act,—or where his intention has been misconceived, and the remedy, in consequence carried too far, or not given full effect to, he may supply desiderata, may state his own meaning with greater precision, and guard, for the future, against an application of the remedy more extensive than the intention. But—poor and limited would be his sphere, were it confined to these functions. The higher province and duty of the legislator, is to exercise a surveillance over something more than the mere judicature of the country,—over the objects, as well as the administration, of the Laws,—over the history of man and the progress of society. Silently but vigilantly is it incumbent upon him to watch the spirit of the age,—the growth of feelings,—the development of principles,—the changes of every kind produced by time,—the demand for different Laws to protect newly-created species of property,—the instances in which society is found lamenting the want of a Law adapted to existing circumstances,—the cases in which it is felt to be disturbed by Laws utterly unsuitable,—the retention of antiquated forms—or the infliction of unprofitable severities."

§ 17. Formerly, general rules were laid down by the Legislature ; "precedent antiquity," says Lord *Coke*, "included much matter in few words." It was instigated in individual cases by judicial construction. It is now the fashion to legislate for particular cases and classes of cases.

"It is the character of modern legislation," says *Dwarris* "that it ap-

<sup>(1)</sup> *Dwarris* on Stat. p. 704.



plies itself to particular cases, and classes of cases, and endeavours to adjust the Law to their varieties, and to determine specifically every kind of right and every corresponding obligation. It is not easy to estimate the practical importance of specific legislation, in adjusting our Law to the various interest of the community. But one of its effects has certainly been to put an end to verbal generalities in propounding the Law, though the draftsman may not invariably succeed in his endeavor to supply its place with aptness and certainty of expression; and often indulges in too much verbiage. But *abundans cautela non nocet*, and to this period belongs the different praise of that wisdom 'which aims to make things as plain, and to leave as little to construction as may be.'"

§ 18. "Laws" says the same authority,<sup>(\*)</sup> "of the latter class, admitted and unexceptionable instances are—I. Laws fashioned by judicial decisions upon pre-existing customs; '*jus moribus constitutum*.' 2. Laws founded upon authority of learned writers and ancient sages of the Law; '*jus prudentibus compositum*.' 3. Laws drawn from the natural Law, founded on the Law of God. 4. Laws of foreign original, fashioned on positive international Law; the *jus receptum*."

§ 19. But though the Judges have unquestionably invaded the province of the Legislature in many instances, especially in older times, it remains to consider whether this was pardonable: and when we find that the latitude taken by the Judges has been the consequence of the supineness of the Legislature, and that the object of the Judges has not been to arrogate to themselves an authority paramount to that of the Legislature, but to adopt the inflexible Law to the altered circumstances of the time, we may easily come to the conclusion that the practice, though indefensible in theory, and unconstitutional, is not only venial, but on the whole has been productive of good to the subject. Who for instance can doubt that the introduction of 'recoveries,'<sup>(v)</sup> in unfettering property from restrictions upon alienations, was a benefit to the subject individually, and conducive to the progress of Society at large?

"As much of the evil just described," says *Dwarria*,<sup>(w)</sup> "is no doubt attributable to the supineness of the Legislature,—something to the narrowness of the rules of the common Law,—but the principal share, to the want of a proper understanding at what point interpretation ought to end, and legislation should begin. Let the discriminating reader look at Burke's eloquent panegyric upon Lord Mansfield, and then ask himself soberly—whether every improvement the orator ascribes to the Judge, how-

(\*) P. 707.

(v) See *Taltarum's Case* Ante. §. 3.

(w) 708.

ever unquestionably meritorious, is not within the province, and ought not to have been effected by the intervention, of the Legislature? 'He sought,' it is said, 'to effect the amelioration of the Law, by making its liberality keep pace with justice, and the actual concerns of the world; and not restricting the infinitely diversified conditions of men, and the rules of natural justice, within artificial circumscriptions, but conforming its principles to the growth of our commerce and our empire.'

§ 20. Hence the meaning of the maxim "*In fitione Juris semper consistit æquitas.*" The Commissioners on the Common Law in their first Report<sup>(x)</sup> make the following observations:—

"Our ancient institutions having been adapted to a rude and simple state of Society, the Courts, in later times, gradually became sensible of defects of jurisdiction and other inconveniences, to which the altered circumstances of the nation had naturally given rise. In some cases the remedy was supplied by Legislative regulations; but where this was wanting, the Judges were apt to resort to fiction, as an expedient for effecting indirectly, that which they had no authority to establish by Law. But to whatever causes the invention or encouragement of legal fictions may be assignable, we have no doubt that they have an injurious effect in the administration of justice, because they tend to bring the Law itself into suspicion with the public, as an unsound and delusive system; while an impression of the ridiculous is also occasionally excited by them, of which the natural effect must be to degrade the science in some measure in popular estimation."

§ 21. It is thus that a large part of the jurisdiction of all our superior Courts of Common Law rests upon usurpation, not upon legislative authority; upon legal fiction, not upon express enactment. Thus the Court of Queen's Bench usurped the civil jurisdiction of the Court of Common Pleas, which originally had exclusive jurisdiction in all suits merely Civil. By a fiction of Law all persons alleged to be prisoners in the custody of the Marshall of the Marshalsea (though not actually so) were held liable to be sued in any personal action in the Queen's Bench. So the Court of Exchequer was instituted for the cognizance of suits touching the matter of the King's revenue. Hence it was established that any person being a debtor of the crown might sue any other in the Exchequer to obtain a right by the withholding of which (*Quo minus*) he was less able to satisfy his debt to the Crown. So the Common Pleas

(x) p. 74.

could not proceed but by writ sued out of chancery ; yet the *capias* proceeded on the fictitious foundation of such previous proceeding without its having been actually taken.

§ 22. But if judicial usurpation of Legislative functions is to be deprecated, infinitely more serious is the Legislative usurpation of the judicial functions. In the first case the evil effects can always be remedied by the Legislative ; but what power, save that of the 'ultimaratio' of physical force is there against the encroachments of the Legislative ? The just preservation of the boundaries between the Legislative and judicial functions is one of the chief safe-guards of the public liberty ; and I cannot close these observations without glancing at the late case of Gunshun Doss in which the Judges of the Madras Supreme Court made a stand against the unconstitutional course of the Indian Legislative Council in constituting itself practically a Court of Appeal from the decision of a judicial tribunal. In that case the history of Acts XXX of 1858, II of 1859 and XVI of 1859 came under review. The language of the Judges is deserving of record, study, and admiration. The Chief Justice said :—

"The Imperial Parliament never expresses any doubt as to the correctness of the Judgment of a Court of Law. Whenever, in consequence of a recent Judgment, the *Imperial Parliament* recites doubts as to the law, it merely takes up the doubts either actually expressed by the Judges themselves or necessarily to be implied from a difference of opinion between them, and then interposes by settling the law for the future, and whenever the *Imperial Parliament* conceives that the Judgment of a Court of Law is likely to lead to inconvenience, it does not question the correctness of the Judgment, it accepts the law as expounded, recites that it is expedient to alter the law, and alters it accordingly. It is for the Legislature to make Acts and not to interpret them.

"I have not dwelt upon this usurpation of our provinces for the purpose of setting right the relations between the Legislative Council and this Court—for it must be manifest that this Court cannot satisfactorily exercise its functions under the supervision and correction of the Legislative Council—but because the matter has a direct bearing upon the matter now before us."

## TOPIC THE NINTH.

### JUDICIAL INTEREST.

*Nemo debet esse iudex in sua propria causa.*

§ 1. The necessity of this maxim is so self apparent, that little need be said concerning it. The Leading case is that of *Dimes v. The Proprietors of the Grand Junction Canal Company*<sup>(a)</sup> where it was held that a judgment of Lord *Cottenham*, assisted by Lord *Langdale*,<sup>(b)</sup> affirming the decision of the Court below in favor of a Company in which he was a shareholder to the amount of several thousand pounds, ought to be reversed.

"No one" said Lord *Campbell* "can suppose that Lord *Cottenham* could be in the remotest degree influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be a judge in his own cause, should be held sacred. . . This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence." The maxim of the Law is *nemo potest esse Iudex, &c.*<sup>(c)</sup>

§ 2. So also in the case of *Price v. Dewhurst*,<sup>(d)</sup> it was held that the judgment of a foreign Court consisting of persons interested in the property in dispute should be disregarded.

§ 3. On this principle stands the necessity of taking care that in the nomination of arbitrators and PUNCHAYETS and the selection of Umpires, persons be appointed who have no interest in the subject matter of the dispute. The ordinary practice in this Country is for each party to bring forward a number of his own kinsmen, friends, or partizans; so that instead of an unbiassed judicial investigation, arbitrament becomes a wrangle of advocates; and I have frequently seen two awards, one in favour of each party; the whole body of retainers signing the documents respectively in favour of the side by which they were nominated.

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(a) 3 H. of L. C. 759 3 C. 17 Jur. p. 73.

(b) 2. Man and G. 285.

(c) See, however, observations on the inconvenient operation of a remote interest in the subject matter of a cause operating to disqualify the Judge; *London and North Western Railway Company v. Lindsay*, 3 Macq. H. L. Cas 99.

(d) 8 Sim. 279, and see Norton on Evidence § 460.

## TOPIC THE TENTH.

### OF POSTPONING THE DELIVERY OF JUDGMENT.

*Nulli differemus justitiam.*

MAGNA CHARTA.

§ 1. "There are two things" says Sir *Thomas Clarke in Ather-ton v. Worth*<sup>(a)</sup> "against which a Judge ought to guard; precipitancy and procrastination." Expedition in administering justice is as much the right of the subject as justice itself. The words of the Magna Charta are "*nulli negari, nulli differre justitiam.*"

§ 2. The evils of deferring a decision was amply illustrated in the Court of Chancery during Lord Eldon's long incumbency of office. The "doubts" of twenty years duration were simply ruin to the suitors; and the Judge may be certain that the habit of procrastination is one of very quick growth. The longer the task of deliberation is deferred, the greater the distaste to enter upon the subject; and it cannot be too constantly borne in mind that it is only the time actually consumed in the operation of deliberation, whether that consists of hours, days, or weeks, which the judge can justify for to his own conscience. The rest of the period between the termination of the hearing and the delivery of judgment is mere waste. "That which is done with thought," writes the historian *Mill*,<sup>(b)</sup> "is that which is done deliberately. That which is done without thought, is that which is done precipitately. It is of no consequence how long a thing remains undone provided thought all the while is never applied to it."

§ 3. Ordinarily speaking Judgment may be delivered most advantageously at the conclusion of the trial. The whole matter is then fresh in the mind of the Judge, and the public are more impressed by Judgment following speedily on the hearing. There may be, and from the accumulation of useless matters on the record, there no doubt frequently are, cases wherein an interval is absolutely necessary to arrange the voluminous matter and eliminate all that is impertinent or irrelevant; to consider what is proved and how; and to write an orderly Judgment. When this occurs, the

(a) 1. Dick. 377.

(b) V. p. 608.

task should not be taken up piece-meal, or the labour gone through in a fragmentary matter. The whole case should be taken up as a whole, and so treated; being deliberated on at one sitting if possible; or at any rate without the intervention of other business.

§ 4. Especially is speedy judgment of importance in criminal cases. Punishment loses half its effect unless it follows speedily on crime. For it is not only the certainty, but the swiftness, of retribution which scares the evil doer.

## TOPIC THE ELEVENTH.

### ON LOOKING FORWARD TO THE CONSEQUENCES OF A JUDGMENT.

*'Argumentum ab inconvenienti plurimum valet in lege.'*

§ 1. This is the last Topic concerning the judicial office on which I shall touch. How he is to deal with evidence, discrepancies, technicalities, I have already endeavoured to teach in my Lectures on Evidence. It would be impertinent to remind the Bench of the qualifications which make up the character of the perfect Judge: the integrity, the impartiality, the temper, the patience, the courtesy,<sup>(a)</sup> the accessibility, the labour, the reflexion, the mercy, the charity. That these are requisites, every man must be conscious, even if he do not possess them: and it rests with every man to weigh himself, estimate his own capacity, and seek to supply his own deficiencies.

§ 2. The subject matter of this disquisition is of no little importance, because the timid is apt to be shackled in the exercise of his discretion by a fear of consequences; while it is the constant cry with others, who think they are thereby exhibiting a laudable spirit of independence, that they care not what the consequences are; their duty is fearlessly to declare the Law. *Fiat justitia ruat cælum* is the maxim of those declaimers.

§ 3. The true distinction I have pointed out in a former work<sup>(b)</sup> consequences *are* to be considered; for a Court will not so construe a Statute as to lead to absurd consequents;<sup>(c)</sup> and the arguments *ab inconvenienti*, and the *reductio ad absurdum plurimum valent in lege*. In *Hall v. Franklin*<sup>(d)</sup> Lord Abinger said—

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(a) We may be excused for referring to the eloquent address of the Attorney General to Mr. Justice Coleridge on the latter's retirement from the Bench; "To a clear and powerful intellect," says the Attorney General, "to legal and constitutional learning, at once accurate and profound, to patient assiduity and attention, your Lordship has also added the estimable and scarcely less important qualities of uniform courtesy, evenness of temper, and kindness of heart." 4 Jur. N. 1. 278.

(b) Evidence § 765.

(c) "Extreme cases are the test of principles." Per Cockburn, C. J., *Roberts v. Haines*, 3 Jur. N. 1. 886.

(d) 3 M. and W. 250.

"We have been strongly pressed with the inconveniences that may result from this construction of the Statute. We are not insensible to them; but the only proper effect of that argument is, to make the Court cautious in forming its Judgment. We cannot, on that account, put a forced construction on the act of Parliament."

This is precisely the point; while the Judge is in the mental act of determining what is the sound construction of a Law, the consequences are a most important element of consideration; when once the deliberative process is complete, and the judgment fully formed, it is the duty of the Judge to be fearless and regardless of consequences.<sup>(e)</sup>

"While a Judge is in the mental act of construction, and during the period and gestation of interpretation, the consequences of any particular exposition will be most properly considered and weighed for the sake of avoiding absurdity, but after the court has arrived at a determinate conclusion as to what is the fit construction that the meaning and context require them to put upon an Act of parliament, the Judges have nothing to do with the consequences of their decision."<sup>(f)</sup>

So in *Reg : v. The Justices of Lancashire*,<sup>(g)</sup> *Patterson* said :—

"I cannot tell what consequences may result from the construction which we must put upon the statutes : but, if mischievous, they must be remedied by the legislature."

§ 4. Accordingly we do find that consequences are considered, and legitimately so, by Courts in coming to an opinion. Thus in *Drew v. Power*,<sup>(h)</sup> Lord *Rodesdale* says :

"In all cases of this sort, we should look a great deal more at the consequences as they may affect other parties, than at the parties in the particular cause; and it is very difficult to consider a case properly in a Court of justice, if the particular circumstances be its sole object : we must look to those general rules and principles which shall guide the conduct of other persons, and enable the Court to administer justice."

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(e) The consequences were much pressed upon the Court in the late Habeas Corpus case (*C. Narrainswmy* an Inf. 24th Sept. 1858,) by Counsel on both sides. Counsel for the Missionaries insisted on the blow to Christianity; Counsel for the infant's father on the distress to the Native community : but the Court refused to bow to such arguments. See S. A. 58 of 57, M. S. E. p. 146. "Public Policy" says Mr. Justice *Burroughs*, "is an unruly horse and if a judge gets upon it, he is very apt to be run away with."

(f) Evidence § 766.

(g) 11 A. and E. 157.

(h) 1 Sch. and Lef. 192.



And in *Ex parte Anthony. In the matter of Richards*<sup>(i)</sup> Lord Eldon said :—

"There is one consideration, of which this Court should never lose sight in every decision which it makes, viz : what is to be the effect of its determination, not in the existing case alone, but upon subsequent similar cases ; that a decision, founded on misapprehension, may not be applied as a principle to cases of the same class which may hereafter arise."

§ 5. General convenience is indeed a well recognized principle of legal judgment. It cannot weigh against settled Law, where if inconvenience arises, the Legislature must interfere : but in the language of Lord Kenyon in *Sadgrove v. Kirby*<sup>(j)</sup> it ought to turn the scale where there are contradicting cases ; and as he says<sup>(k)</sup> in *Rex v. Marten and Fellows of St. Catharine's Hall* it is a guide on untrodden ground. *Non Solum quod licet, sed quid est conveniens est considerandum*, says Littleton.<sup>(l)</sup> Thus in *Att. Genl. v. Duke of Marlborough*,<sup>(m)</sup> Sir John Leach said—

"Arguments of inconvenience are sometimes of great value, upon the question of intention. If there be in any Deed or Instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the Grantor. But where there is no equivocal expression in the Instrument, and the words used admit only of one meaning, arguments of inconvenience prove only, want of foresight in the Grantor ; but because he wanted foresight, Courts of Justice cannot make a new Instrument for him ; they must act upon the Instrument as it is made."

And in *Deane v. Clayton*,<sup>(n)</sup> Burroughs, J. said—

"In questions, the decision of which depends on the principles of the common law, and which are attended with difficulty and doubt, I have been used to look forward to the consequences which must result from the decision. If great inconveniences will result from one decision, which may be avoided by a different course, I think that the Court ought, before it decides, to be satisfied that the law is clear, and that it imperatively calls for a decision which will produce these inconveniences ;

(i) 2 Glynard J. 178.

(j) Co Litt : 66 a.

(k) 6. Durn and East 486.

(l) 3. Madd. § 540.

(m) 4. Durn and East 243.

(n) 7. Taun. 496.

to this extent only do I suffer the idea of inconvenience to affect my mind."

§ 6. The Law will rather suffer a private mischief than a public inconvenience. *Lex citius tolerare vult privatum damnum quam publicum malum.*<sup>(o)</sup>

§ 7. It may be added here that in considering whether a contract would be specifically performed, a Court may look to a certain extent at the hardship it will impose on either of the parties to it. The hardship will be judged of with reference to the circumstances as they stood at the time the contract was entered into, not from subsequent events which may have rendered the bargain more or less un-beneficial. Contingencies may arise from matters never contemplated by the parties at the time of their agreement, which if before their minds might have modified or prevented the contract. But it is quite clear that where the hardship has been brought upon the defendant by himself, he cannot set it up as a defence.

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(o) Co. Litt. 152 b.

## TOPIC THE TWELFTH.

### NO RIGHT WITHOUT A REMEDY.

*Ubi jus ibi remedium.*

§ 1. There can be no legal wrong without a legal remedy ; so tender is the Law, and especially Equity, in preserving the freedom and the privileges of every member of Society. Frivolous actions are no doubt to be discouraged, and where no substantial rights were concerned, the Court of Sudr Adawlut gave judgment against the Plaintiff, notwithstanding that at Common law he would be entitled to a verdict with nominal damages. Thus in trespass—where the Plaintiff failed to show that he had in fact suffered any loss—judgment was given against him though a trespass had in fact been committed by the defendant.<sup>(a)</sup> But these decisions cannot be sustained ; wherever there has been an infringement of right, an action lies for its vindication, and in every such case proof of the wrongful act done will entitle the Plaintiff to judgment. We have already seen many cases in which Equity gives a remedy where there is none at Law ; and this maxim deserves the especial study of the Judge, because it opens up the extensive topic of *Damages*,<sup>(b)</sup> which must form a portion of his deliberation in almost every case in which he holds the Plaintiff entitled to his judgment. *Lex semper dabit remedium.*

The Leading Case on this maxim is that of *Ashby v. White*<sup>(c)</sup> which gave occasion for one of Lord *Holt's* noble expositions of the Law ; which led to one of the most furious controversies between the Houses of Lords and Commons ; and which has been selected by Mr. *Smith* as the centre for one of his luminous commentaries. There, a voter for members of Parliament brought his action against the returning officer for refusing to admit his vote ;

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(a) No. 1, of 1817, 1 S. D. 144, No 12-24, 1 S. D. 480.

(b) The Hindoo Law according to Mr. Ellis knows nothing of discretionary damages, 2. Strange, 337.

(c) 1 Sm : L. C. 185. But the case of *Ashby v. White* has been very materially qualified by the recent case of *Foser v. Child*, 26, L. J. (Q. B.) 151. There it was shown from an M.B. report of Lord *Holt's* judgment, that the returning officer was actuated by *malice* in refusing the vote. Otherwise any *quasi* judge of any matter of opinion might be held responsible for a mere error of judgment.

a verdict was found for the Defendant. Three of the Judges, *Gould, Pouys, and Powell*, held that the action would not lie. Lord *Holt* held that the Plaintiff was entitled to a verdict. Judgment was arrested ; and on the 14th January 1703 the verdict was reversed in the House of Lords, and Judgment given for the Plaintiff by fifty Lords against fifteen. In the course of his Judgment Lord *Holt* said:—

“ I will do these two things ; First, I will maintain that the plaintiff has a right and privilege to give his vote : Secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the Law gives him an action against the disturber, and that this is the proper action given by the Law.”

After proving the existence of the right, he proceeds :—

“ If the Plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it ; and indeed it is a vain thing to imagine a right without a remedy ; for want of right and want of remedy are reciprocal.”<sup>(d)</sup>

In answer to the objection that the Plaintiff had suffered no pecuniary loss he said :—

“ My brother *Powell* indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the Plaintiff ; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary ; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury.”

In reply to the argument that this was a new species of action he said :—

“ And it is no objection to say, that it will occasion multiplicity of actions : for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose

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(d) Thus it has been held that a suit is maintainable for the office of Headman to superintend the Car Feast 165-57 11/12 : so for the hereditary office of Musician of the Salem Pagoda 51-53 11/12 : so the office of Lecky (personation of the Idol) in the Madura Pagoda 30-53 11/12. So for the recognition of Plaintiff's claim as head of the tribe, S. D. A. Beng. 390, 29th June 1847.

the Defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance, every man shall have his action, as is agreed in *William's case*,<sup>(e)</sup> and *Westbury and Powell's*.<sup>(f)</sup> Indeed, where many men are offended by one particular act, there they must proceed by way of Indictment, and not of action; for in that case the Law will not multiply actions. But it is otherwise, when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case per *quod communiam suam in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a high way; every passenger shall not bring his action, but the (a) party shall be punished by Indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of *Turner v. Sterling*, the plaintiff was not elected; he could not give in evidence the loss of his place as a damage, for he was never in it; but the gist of the action is, that the plaintiff having a right to stand for the place, and it being difficult to determine who had the majority, he had therefore a right to demand a poll, and the defendant, by denying it, was liable to an action. If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences." And again, "But this saying has no great force; if it had, it would have been destructive of many new actions, which are at this day held to be good Law. The case of *Hunt and Downman*, before mentioned, was the first action of that nature, but it was grounded on the common reason and the ancient justice of the Law. So the case of *Turner and Sterling*. Let us consider wherein the Law consists, and we shall find it to be, not in particular instances and precedents, but in the reason of the Law, and *ubi cadem ratio, ibi idem jus*."

§ 2. It is on this ground that a particular form of action, called "an action on the case" has been sustained. The original writs were few, and not fitted to every variety of complaint in all its special circumstances; the Clerks in Chancery framed new writs on the precedents of the old; and the Statute of Westminster<sup>(g)</sup> provided as follows:—

"Whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like Law, and requiring like remedy, is found none, the Clerks of the Chancery

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(e) 5 Co. 73. a.

(f) Co. Lit. 56. a.

(g) 2, 13. Edward 1. C. 24.

shall agree in making the writ; or adjourn the plaintiff's until the next Parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next Parliament, by consent of men learned in the Law, a writ shall be made, lest it might happen after that the Court should long time fail to minister unto complainants."

So in *Darley v. The Queen*<sup>(A)</sup>, a case of *Quo Warranto*, Lord *Brougham* said:—

"My Lords, I have one very material consideration which inclines my mind independently of the balance of authority being, as I think with the learned Chief Justice it is in favour of the judgment of the Court below in favour of the Defendant in error: I mean that if there is not this remedy there really is no other. It is necessary there should be this remedy, or else in a case like the present would be remediless."

§ 3. Upon this point, the case of *Paley v. Freeman*<sup>(B)</sup> is the Leading Case. There it was held that a false affirmation by the Defendant, made with intent to defraud the Plaintiff, whereby the Plaintiff receives damage, is the ground of an action upon the case, in the nature of deceit. In *Watson v. Toulson*,<sup>(C)</sup> this proposition is thus expressed by *Parke, B.*:—

"In *Tolhill v. Walter*,<sup>(D)</sup> we held, for I was a party to the judgment in that case, that the telling an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage, fulfils all the requisites to support an action for deceit."

We shall have occasion to revert to this case again for another purpose. It was the first attempt to hold a man pecuniarily responsible for a false representation as to the character of another, on the faith of which the Plaintiff had trusted the third party. There, it was argued, indeed admitted, that this was a new action for which no precedent could be found. Mr. Justice *Ashurst* meets this thus:—

"Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance: but where the case is only new in the instance, and the only

(A) 12. CL. and F. 520.

(B) 3. T. B. 51. ib. 2 Sm: L. C.

(C) 15 Jur. 1111.

(D) 3 B. and Ad. 114.

question is upon the application of a principle recognized in the Law to such new case, it will be just as competent to Courts of Justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago : if it were not, we ought to blot out of our Law-books one fourth part of the cases that are to be found in them."

§ 4. These quotations will show how determined the Law is in securing the means of remedy when injury has been inflicted. It is through this tenderness that the writ of *Mandamus* issues. So in *The King v. The Bishop of Chester*,<sup>(1)</sup> it was held that the writ of *Mandamus* only issued when there was no other specific legal remedy. The rule is, *ubi cessat remedium ordinarium ibi decurritur ad extraordinarium et nunquam decurritur ad extraordinarium ubi valet ordinarium*.

§ 5. But perhaps the maxim is not less valuable for its limitations than its illustrations. For it is very far from true that every thing of which a man may complain entitles him to redress. *Jus* signifies, in the sense in which it is used in the maxim, "the legal authority to do or demand something." *Remedium* may be defined "right of action." Thus then the literal rendering of the maxim would be, "Wherever there exists a legal authority to do or demand something ; there exists also the right of action to enforce that legal authority."

§ 6. Hence it will be seen that merely *moral* or *imperfect* obligations, such as fall within the province of Ethics, are not enforceable at Law. *Non omne quod licet honestum est*. Benevolence, gratitude, charity, mere *nuda pacta*, promises made without any consideration or equivalent, cannot be enforced, or their breach compensated for by any Court.

§ 7. Hence too where there exists what is called "*damnum absque injuria*," a damage unaccompanied by what the Law estimates an injury, the maxim does not apply. That is not a sort of *jus* which the Law recognizes ; it has not therefore appointed any '*remedium*' for it. *Actio non datur non damnificato*.

§ 8. Thus a man suffers '*damnum*' when he is rightfully committed to prison by lawful authority ; but if he be guilty, he cannot be said to have suffered *injuria* ; and hence he cannot possibly succeed in an action against the authority who committed him. Or again, if he be committed for safe custody, on suspicion which ulti-

(1) 1 Jac. 404.

imately turns out ill-founded ; here though the '*damnum*' is more grievous to the individual, the Law does not recognize any *injuria*, in the absence of malice on the part of the authority ; for it was an act necessary for the maintenance of society ; and the maxim is, '*nemo damnum facit nisi qui id facit quod facere jus non habet.*' No one is a wrong doer but he who does what the Law does not allow. So also of a private individual criminally prosecuting a fellow subject, *bonâ fide* and with probable cause. So also of privileged communications, which, but for the occasion, would be libellous. To give a true but unfavorable character of a discharged servant to a person applying for it, may inflict *damnum*, but the Law says *sine injuriâ*. So of fair criticisms, however painful to the feelings of the party criticised.<sup>(m)</sup> So houses may be pulled down, or bulwarks ruined, on private property for the public defence, without an action lying. So a man may pull down his

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(m) There are two Cases which deserve notice here. The first is that anomalous and scandalous condition of the English Law, by which, even in the present day, a father cannot sue for the seduction of his daughter *unless she was in his service*, even though he be compelled by her seduction to maintain her. *Eggar v. Grimwood* 1 Exch : for it must be alleged and found '*per quod servitium amisit.*' The law however presumes service from residence with the father *Mawder v. Venn*, M. and M. 323, *Torrenses, v. Gubbins*, 5 Q. B. 297. The other was the result of the principle '*actio personalis moritur cum persona*,' through which it was held that the representatives of a deceased who had lost his life through the wrongful act, neglect or default of another had no claim to damages. The increase of accidents consequent on the spread of railways rendered a change in the Law imperative ; and now by 9 and 10 Vic. C. 93, Act 13, of 1855, it is enacted that "whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrong doer in such case should be answerable in damages for the injury so caused by him ; be it therefore enacted, That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

By Sec. 2. "That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased ; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought ; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

In *Blake v. Midland Railway Company*, 18 Q. B. 93. S. C. 16 Jur. 562, which was a motion for a new trial in the provisional excess in damages, the Jury having given £4000 ; the Court put the construction on this act in the following Judgment delivered by Coleridge, J. :—

"The title of the act may be some guide to its meaning, and it is "An Act for compensating the Families of Persons killed by Accidents," not for solacing their wounded feelings. Reliance was



neighbour's house to arrest a conflagration. For, *salus populi suprema lex*; and *privatum incommodum publico bono pensatur*. So where a highway is so out of repair as to prevent travelling, I may justify trespassing on the adjoining land.<sup>(\*)</sup>

§ 9. Again, *damnum* may happen to one individual through another exercising his undoubted lawful right, and yet the Law

placed upon the 1st section, which states in what cases the newly-given action may be maintained, although death has ensued, the argument being, that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representative on his death. But it will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles. Sect. 3 enacts, that "in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family.\* This language seems more appropriate to a loss, of which some estimate may be made by calculation, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings. The division of the amount strongly leads to the same conclusion—"And the amount so recovered shall be divided amongst the before-mentioned parties, in such shares as the Jury by their verdict shall find and direct." By what rule ought the Jury to be guided in this apportionment? Are they to inquire into the degree of mental anguish which each member of the family has suffered from the bereavement? Then, not only a child void of filial piety, but a lunatic child, and a child of very tender years, and a posthumous child, on the death of a father, may have something for pecuniary loss, but cannot come in *pari passu* with the other children, and must be cut off from the solatium. It seems to us, that if the Legislature had intended to go to the extreme length, not only of giving compensation for pecuniary loss, but a solatium to all the relations enumerated in sect. 5—viz. father and mother, and grandfather and grandmother, and step-father and step-mother; son and daughter, and grand-son and grand-daughter, and step-son and step-daughter—language more clear and appropriate for this purpose would have been employed.

"An argument has been drawn from sect. 4, which requires the plaintiff to deliver a particular of the nature of the claim in respect of which damages shall be sought to be recovered," as if it were so much for pecuniary damage and so much for solatium. But these words will be abundantly satisfied by a statement of the manner in which the pecuniary loss to the different persons for whom the action is brought is alleged to have arisen.

"We conceive that the Legislature would not have thrown upon the Jury such great difficulty in calculating and apportioning the solatium to the different members of the family without some rule for their guidance. Where an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental sufferings, along with an indemnity for his pecuniary loss. There may be a calculation of the pecuniary loss sustained by the different members of a family from the death of one of them; but if a Jury were to proceed to estimate the relative degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants. We must recollect that the act we are construing applies not only to great railway companies, but to little tradesmen, who send out a cart and horse under the care of an apprentice."

- (\*) But it is no defence yet that the matter is a fair report of a Public Meeting, *Devison v. Duncan*, 7 E. and B. 229, or perhaps, *ex parte judicial* proceedings. *Hoare v. Sikerlock*, 9 C. B. 20.

\* It is not necessary however to disclose or allege pecuniary damage. *Chapman, v. Rothwell*, 27 L. J. N. S. Q. B. 315.

recognize no *injuria*; for according to the maxim quoted in the previous section, no man can be guilty of illegality in taking advantage of any power or privilege which the Law itself allows him. Thus where A sets up a school near one already established, or a mill near his neighbour's;<sup>(e)</sup> though he may draw away custom and so occasion loss, the act is not actionable. In *Acton v. Blundell*,<sup>(f)</sup> *Addison arguendo* said:—

“The maxim, *sic utere tuo ut alienum non ledas*, does not go to forbid *damna* generally, but *damna injuriosa*. To constitute a violation of that maxim, there must be *injuria* as well as *damnum*. There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbour, so as it be not *injuriousum*. He may build a wall on his own ground, so as to obstruct the lights of his neighbour, who may not have acquired a right to them by grant or adverse use. He may build a mill near the mill of his neighbour to the grievous damage of the latter by loss of custom, and so in other cases. In *Bracton*, lib. 4, fol. 221, there is the following passage:—  
“*Nocumentum enim poterit esse justum, et poterit esse injuriosum. Injuriousum, ubi quis fecerit aliquid in suo injuste contra legem vel contra constitutionem, prohibitus a jure. Si autem prohiberi a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriosum, licitum est enim unicuique facere in suo quod damnum injuriosum non eveniet vicino, ut si quis in fundo proprio construat aliquod molendinum et sectam suam et aliorum vicinorum substrahat vicino, facit vicino damnum et non injuriam: cum a lege vel a constitutione prohibitus non sit ne molendinum habeat vel construat.*” To derive, therefore, any aid from the maxim, *sic utere*, &c., the Plaintiff must show that he has sustained *injuria*, which is the whole question.”

§ 10. But a man must not pursue his lawful right so negligently, as to cause avoidable damage to another.<sup>(g)</sup> If a man for instance so negligently erect a hay-stack on the edge of his own land, that it ignites and fires his neighbour's house an action lies. So in *Vaughan v. Menlove*,<sup>(h)</sup> *Tindal, C. J.* said:—

“I agree that this is a case *primæ impressionis*; but I feel no difficulty in applying to it the principles of law as laid down in other cases

(e) Thus it has been held that there can be no *merasie*, i. e. exclusive right of shaving within certain limits nor to exclusive practice of Midwifery, 64-81 2 B. D.

(f) 12 M. and W. 341.

(g) If one uses an Instrument likely to produce damage and it produce it—it is sufficient to found negligence though every care be taken. *Vaughan v. Taff Vale Railway Co.* 4 Jur. n. s. 1302.

(h) 3 Bing : N. C. 474.

of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the Defendant is liable for the consequence of his own neglect: and though the Defendant did not himself light the fire, yet mediately, he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbour, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee: *Turberville v. Stamp*.<sup>(e)</sup> But put the case of a chemist making experiments with ingredients, singly innocent, but when combined, liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbour, can any one doubt that an action on the case would lie?

"It is contended, however, that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the Defendant had acted *honestly* and *bonâ fide* to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs v. Bernard*.<sup>(f)</sup> Though in some cases a greater degree of care is exacted than in others, yet in 'the second sort of bailment, viz. *commodatum* or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him: but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable,

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(e) 1 Salk. 13.

(f) 2 Ld. Raym. 909.

because the neglect gave the thieves the occasion to steal the horse.' The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

"Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged."

And *Parke, B.* said :—

"I entirely concur in what has fallen from his Lordship. Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others. In *Turbervill v. Stamp*<sup>(\*)</sup>, which was 'an action on the case upon the custom of the realm, *quare negligenter custodivit ignem suum in clauso suo, ita quod per flammam blada Quer, in quodam clauso ipsius Quer. combusta fuerunt* ; after verdict *pro Quer* it was objected that the custom extended only to fire in his house, or curtilage (like goods of guests) which were in his power: *Non alloc.* For the fire in his field was his fire as well as that in his house; he made it and must see that it did no harm, and must answer the damage if he did. Every man must use his own so as not to hurt another: but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shewn it. And *Holt*, and *Rokesby*, and *Eyre* were against the opinion of *Turton*, who went upon the difference between fire in a house which was in a man's custody and power, and fire in a field which was not properly so; and that it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the Plaintiff had judgment according to the opinion of the other three. That case, in its principles, applies closely to the present."

In *Filliter v. Phippard*,<sup>(\*)</sup> Lord Denman discussed the principle, as follows :—

"This was a motion in arrest of judgment, on a declaration stating (with some other particulars) that the plaintiff was possessed of a close in which certain hedges and gates were standing, and several trees growing; that the defendant was possessed of an adjoining close; and that

(\*) 1 Salk. 13.

(\*) 11 Q. B. R. 353.

the defendant made and kept a fire in his close in such a negligent manner, and at a time when, by reason of the then state of the wind and weather, it was dangerous and improper so to do, that, through the negligence and improper conduct of himself and his servants, and for want of due care and caution, the said fire extended itself out of his close into plaintiff's, and the plaintiff's trees, hedges, fences, &c. were burnt and destroyed.

"The ancient law, or rather custom of *England*, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss. And it is well established that, where the fire was occasioned by a servant's negligence, the owner, the master of the house where it began, is answerable for the consequences to the sufferer. And the case of *Turberville v. Stamp*<sup>(\*)</sup>, the last decided before stat. 6 *Ann. c. 31.*, makes this plain and declares the same principle where the fire originates in the defendant's close. The Act contemplates the probability of fires in cities and towns arising from three causes, the want of water, the imperfection of party walls, and the negligence of servants. The Act provided some means for supplying these material defects: but the third section was directed against the moral one, the carelessness or negligence of servants, which (it observes) often causes fires: and it imposes on *the servant* by whose negligence the fire may have been occasioned a fine of 100*l.*, to be distributed among the sufferers at the discretion of the churchwardens, or imprisonment for eighteen months in case of nonpayment. The clause, raising the same sum whatever the extent of suffering and the number of the sufferers, and inflicting the same penalty to whatever degree the negligence may have been culpable, without any power to lower the fine or shorten the imprisonment, can scarcely be supposed to have undergone much consideration on the part of the legislature. The most usual cause of fires was assumed to be the negligence of servants: and the enactment might operate to induce habits of caution in that important class. The same statute, in the sixth section, enacts that, after a day named, no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompence be made by such person for any damage suffered or occasioned thereby.

"Both provisions seem to have found favour with the legislature; for both were re-enacted by stat. 12 *G. 3. c. 73.* and stat. 14 *G. 3. c. 78.*<sup>(\*)</sup>; the latter (*s. 86.*) adding, to the words 'house or chamber,' 'stable, barn, or other building;' and also the words 'or on whose estate.'

(\*) 1 Comyns's R. 32.; S. C. 1 Salk. 13.

(\*) Sects. 84 and 86 are also retained without alteration by stat. 7 & 8 *Vict. c. 84. s. 1.* and sched. (A).

"No terms can be more comprehensive. We cannot doubt that Baron Parke, in *Richards v. Easto*,<sup>(y)</sup> rightly viewed it as a general law. And, though the word 'estate' is used in a sense very different from that which it bears in the language of the law, it clearly applies to land not built upon, and makes the owner of such land liable in the same manner as it had previously the owner of buildings.

"The question then is upon the meaning and effect of the word 'accidentally,' here applied to fire. And here a very singular doubt has arisen from the mode in which this enactment is discussed by Sir William Blackstone in his *Commentaries*. The passage is introduced by that learned writer incidentally, as an illustration of the principle on which masters are held responsible for the acts of their servants.<sup>(z)</sup> 'Upon this principle, by the Common Law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service.' 'But now' (he proceeds) 'the Common Law is altered by statute 6 Ann. c. 3.' (it should be c. 31.; ss. 3, 6.), 'which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness.' This reason, by the way, is not stated in the Act of Parliament, and must be allowed to be very far from satisfactory; because the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers. Besides, making servants punishable for fires resulting from their negligence is no exemption of masters from responsibility for the same fault; for fires which *accidentally begin* are not fires produced by negligence.

"It would, therefore, appear that Blackstone had drawn a conclusion from the enactment cited, which it by no means sustains. Lord Lyndhurst, however, has in some degree sanctioned by his high authority the inference thus drawn by Blackstone, in the remarks by which he prefaced his decision against Lord Conterbury's petition of right.<sup>(a)</sup> We must, however, observe that those remarks are wholly unnecessary for the decision to which he came, and indeed are stated rather as arguments with which that petitioner would have had to contend, if his cause had come to a hearing on the merits, than as expressing a deliberate opinion.

"It is true that, in strictness, the word *accidental* may be employed in contradistinction to wilful, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and

(y) 15 M. &amp; W. 244.

(z) 1 Bla. Com. 431.

(a) 1 Phil. Ch. R. 306.

so would stand opposed to the negligence of either servants or masters. And, when we find it used in statutes which do not speak of wilful fires but make an important provision with respect to such as are accidental and consider how great a change in the Law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servant, we must say that we think the plaintiff's construction much the most reasonable of the two.

"Lord *Lyndhurst* remarked on the absence of decisions on this point. Yet he mentions two cases, both surely entitled to great weight, one tried before *Alderson, J.*, in *Berks*, the other before *Patteson, J.* in *Salop*, which latter was very fully discussed on a rule to show cause, and decided by the whole Court of Common Pleas.<sup>(b)</sup> In both these cases a plaintiff recovered damages for a fire spreading to his corn from the defendant's field through the negligence of the defendant and his servants. His Lordship says that stat. 14 G. 3. c. 78. escaped notice on those occasions. But, if we ask how it came to be overlooked, since it would have furnished a complete and easy defence, the only answer can be the universal impression of the eminent lawyers, both at the bar and on the bench, who took part in the argument and judgment, that the clause in the building Act respecting accidental fires cannot apply to such as are produced by negligence.

"It may be further observed, with reference to this doctrine, that the exemption given by this enactment cannot apply. Its words suppose the fire to begin accidentally on the estate of him from whose estate it spreads. Now this fire did not begin accidentally, but was knowingly lighted by the defendant himself."<sup>(c)</sup>

So a man must not keep his fences so negligently that his neighbour's cattle stray into his ground and are there accidentally injured. If he does, he shall pay for it. So in *Powell v. Spilsbury*,<sup>(d)</sup> where the Plaintiff declared against the Defendant for not repairing his fences, *per quod* the plaintiff's horses escaped into the

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(b) *Vaughan v. Menlove*, 3 New Ca. 468.

(c) And see *Viscount Camberbury v. The Atty. Gen.* 1. Ph. 306, a curious case in which the Speaker of the House of Commons sought to recover damages against the Queen, for the loss occasioned to his private property by the fire that burnt down the house of Parliament. By the Law of England, the tenant is bound to continue paying rent though the premises are destroyed by fire. In the case of *Lofft v. Dennis*. 5 Jur. n. s. p. 727. Lord Campbell points out that by the Law of Scotland the tenant is relieved under such circumstances of his liability to pay rent, and in *v. Shindley*, 15 Jur. 958.

(d) 2 Y. and J. 391.

defendant's close, and were there killed by the falling of a haystack : Held, that the damage was not too remote, and that the action was maintainable.<sup>(e)</sup>

Still less may he *entice* his neighbour's cattle to their destruction or injury. Therefore in *Townshend v. Wathen*.<sup>(f)</sup>

"Where the defendant set traps baited with strong-smelling flesh so near the edge of his property, as thereby to entice the plaintiff's dogs in the neighbouring close, which were caught in the traps and wounded, it was held that the defendant was liable. Lord *Ellenborough* said, "Every man must be taken to contemplate the probable consequences of the act he does. And, therefore, when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all dogs coming accidentally within the sphere of the attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force?"

§ 11. A man will be responsible for the consequences of his unlawful acts, whether they be the result of *negligence* or *misfeasance* ; of omission or commission. Of the first, (non-feasance or omission) we may take as illustration the ordinary case of non-performance of a contract, for which damages lie ; or independent of any contract, between the parties, the neglect of a person on whom the Law casts a duty, to perform it ; as the refusal of an innkeeper to entertain, a carrier to carry, a ferry-man to ferry, a farrier to shoe a horse, and the like.

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(e) The obligation to maintain the fences bordering a highway is a question of much importance. It will be found discussed in the notes to the Leading Case of *Dovaston v. Payne* 2 Sm. L. C. 113. Railway Acts usually provide for the fencing by the Company. In *Manchester and Sheffield Railway Company v. Wallis* 14 C. B. 213, as the Company were bound to keep the gates of their crossroads always closed, the Plaintiff's horses were held lawfully on the Rail, as against them : and in *Midland Railway Company v. Dakin*, 25, L. J. C. P. 73, the same point was ruled.

(f) 9 East, 277.



Of the second, the case of *Scott v. Shepherd*<sup>(g)</sup> may serve as an example, where a man who threw among a crowd a lighted squib, which two persons successively threw away in self-defence, and which ultimately put out the Plaintiff's eye, the *original thrower* was held responsible.

§ 12. Again, when the *damnum* is the consequence of the Plaintiff's *own* act, which he might have avoided, he shall not tax the person who has caused it, with responsibility for any *injuria*. Many other illustrations of the principle on which right to damages proceeds, will be found under other maxims, when we come to discuss them. Such for instance as *Sic utere tuo ut alienum non ledas*. The scope of this work precludes any thing more than an enumeration of the more striking points on each subject. The books themselves to which my observations are but guide posts, must be read. In *Sarch v. Blackburn*<sup>(h)</sup> this principle was well illustrated. There, an action was brought for knowingly keeping a ferocious dog accustomed to bite mankind, and which bit the Plaintiff. The Plaintiff was a watchman of the parish, and was bitten as he was going in the middle of the day to the Defendant's house by a back way, which the Defendant contended was a private way for himself and family only.

The Plaintiff was alone at the time; and there was no evidence of the reason of his being in the place where he was bitten. There was a notice "Beware of the dog," but the Plaintiff could not read. *Tindal*, C. J., left it to the Jury to say on which side there was negligence.

"If the Plaintiff was negligent, if he was where he ought not to have been, or if he neglected means of notice, he cannot recover, if the Defendant placed the dog where he might injure persons, not themselves in fault, he is responsible.

"The Plaintiff certainly is not entitled to recover in this action, if

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(g) 2 W. Blac. 892.—1. Sm. L. C. 343., the note to which is principally dedicated to a consideration of the proper form of action where the injury is immediate or consequential, with which we need not puzzle ourselves. The Common Law procedure Act of 1852 has gone far to destroy the importance of such distinctions in English Courts. The student need not trouble himself about 'case' and 'trespass' 'assumpsit' and 'trover.' The bearing as to "forms of action" is inapplicable in the Municipal Courts: and the sooner it becomes obsolete in Her Majesty's Courts the better.

(h) 4 C. & P. 297, and see observations and cases in 5 Jur. n. s. pt. 2. p.p. 241-283.

he was injured by his own fault. There is no evidence to show why the Plaintiff was on the spot in question, whether with a lawful or unlawful object. The Law, however, would rather presume a lawful object; and there is no improbability in his having one, for he was on one of the ways to the house itself at mid-day, although certainly it was not the most public and usual way. If he was lawfully there, I do not think the mere fact of the Defendant's having put up the notice relied on would deprive him of his remedy. The mere putting up the notice is not sufficient for this, unless the party injured is at least in such a condition as to be able to become cognizant of its contents. The Plaintiff could not read; the notice, therefore, furnished no information to him; and there were no circumstances in the way in which the dog was kept to apprise him of the danger. If, therefore, he had a right to be where he was, I see no fault or negligence in him to deprive him of his remedy. Still the Defendant will not be liable unless he is in fault; unless he knows the character of the dog, which he certainly did in this instance, and unless he keeps it improperly with that knowledge. The mere putting up the notice does not, I think, in this case excuse him. But it is said, that he has a right to keep a fierce dog to protect his property. He certainly has so; but not, in my opinion, to place it on the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. If the dog was placed in such a situation that he could injure the Plaintiff, ignorant of the notice, and going for a lawful purpose to the house by a way which he was entitled to use, I think the Defendant would not be protected from this action."

The maxim of the Roman Law is, '*Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*' No man is injured by what he suffers though his own fault. In *Hale v. Barlow*,<sup>(i)</sup> Byles, J., in charging the Jury said:—

"It used to be thought if a man knew there was a nuisance and went and lived near it he could not recover, because it was said it is he that goes to the nuisance and not the nuisance to him; that used to be thought 100 years ago to be the law. That however is not the law now."

The two questions in every case of nuisance are—1st, Is it a proper place for carrying on the trade complained of; and 2ndly. If not, then is the nuisance such as to make the enjoyment of life and

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(i) 4 Jur. n. s. 1019.

property uncomfortable. In *Elliotson v. Feetham*(j) long user was held a justification of a noisy trade.(k)

So if a man builds so near my land, that I can block out his light and air by running up a wall, I may do so without being liable to an action; for it was his folly to choose such a site; though if I permit him to enjoy his air and light undisturbed for twenty years, I shall not then be permitted to obstruct them. The Plaintiff closed up his ancient lights for 19 years, but upon Defendants building so as to obstruct them, reopened them. Held that the Plaintiff was entitled so to do, unless he had so closed up the lights, as to manifest an intention of permanently abandoning them, or to lead Defendant to incur expense or loss, in the reasonable belief that they had been permanently abandoned. *Stokes v. Signora*.(l)

§ 13. This principle of *negligence* is of frequent application in cases of collision between ships, in which it is essential to the Plaintiff to show that the act was not the consequence of any negligence or misfeasance on his part. Of this more hereafter.

§ 14. But this rule has qualifications. Mr. *Mayne* writes as follows(m):—

“The rule has been laid down and repeatedly recognised, that although there may have been negligence on the part of the Plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the Defendant’s negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong. And where the immediate cause of the accident is the Defendant’s fault, so that without it the accident could not have happened at all, it is no answer, that only for the Plaintiff’s negligence in something collateral to the immediate cause of the injury, it or part of it might have been avoided.(n) For instance, where two omnibuses were racing, and one struck against the other, it appeared that if the omnibus in which Plaintiff was riding had been driving slower, it might have been pulled up after a collision, and the accident prevented. And

(j) 2 Bing. N. C. p. 134.

(l) 8 *Ellis and Blackburn*, 31.

(k) 4 Bing. N. C. 183.

(m) *Mayne on Damages*, p. 31.

(n) If but for Plaintiff’s default the collision could not have happened, there the Plaintiff can maintain no action. But if Defendant by ordinary care could have avoided the consequences of any negligence on the part of the Plaintiff—then the Plaintiff is entitled to recover, *Tuff v. Warman*, 5 Jur. n. s. 222.

so were the injury to Plaintiff was caused by a steam boat collision in which the Plaintiff was hurt by the falling of an anchor in his own vessel: held, that even if it had been shown that the anchor had been negligently stowed, and that the Plaintiff ought not to have been in that part of the vessel, (which however the Jury negatived), this would have been no answer: that a man who is guilty of a wrong, and thereby produces mischief to another, has no right to say part of that mischief would not have happened if you had not been yourself guilty of some negligence, and that where the negligence did not in any degree contribute to the immediate cause of the accident, negligence ought not to be set up as an answer."

So in *Davies v. Mann*<sup>(o)</sup>—

"Where the defendant negligently drove his horses and waggon against and killed an ass, which had been left in the highway fettered in the forefeet, and thus unable to get out of the way of the defendant's waggon, which was going at a smartish pace along the road, it was held, that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover."

There *Parke, B.* said:—

"This subject was fully considered by this Court in the case of *Bridge v. The Grand Junction Railway Company*<sup>(p)</sup>, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that 'the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong.' In that case of *Bridge v. Grand Junction Railway Company*, there was a plea imputing negligence on both sides; here it is otherwise; and the Judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is

(o) 10 M. and W. 546.

(p) 3 M. & W. 216.

the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

But in *Thorogood v. Bryan*,<sup>(g)</sup> it was held that—

"One who sustains an injury from a collision with a carriage or a vessel, cannot maintain an action against the owners of such carriage or vessel, if negligence either on his own part, or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part."<sup>(r)</sup>

And the judgments are so important that they should be studied. *Coltman, J.* said :—

"The case of *Thorogood v. Bryan* seems distinctly to raise the question whether a passenger in an omnibus is to be considered so far identified with the owner, that negligence on the part of the owner or his servant is to be considered negligence of the passenger himself. As I understand the law upon this subject, it is this,—that a party who sustains an injury from the careless or negligent driving of another, may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse, is, not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me, that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury."<sup>(s)</sup>

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(g) 8 C. B. 115.

(r) The Plaintiff, a child, under the care of its grandmother, was injured partly owing to negligence of the Defendant and partly to the negligence of the grandmother. Held that no action was maintainable. *Waste v. Great Eastern Railway Co.* 27 L. J. n. 1. Q. B. 417.

(s) This seems to be the supposition which the learned editors of the third edition of *Smith's* Leading Cases designate as "inconceivable."

*Maule*, J. said :—

“I agree with my brother *Coltman* in thinking that the rule in *Thoroughgood v. Bryan* ought to be discharged. This is an action brought to recover damages against an omnibus proprietor for, negligently causing the death of the plaintiff's husband, by knocking him down and driving over him as he had just alighted from another omnibus. My brother *Williams*, in leaving the case to the jury, told them, that, if they should be of opinion that the occurrence was purely accidental, or that the deceased, or the driver of the omnibus by which he was carried, had by any negligence or want of care on their part contributed to the accident, they must find for the defendant. The jury having, upon that direction, found for the defendant, it must be assumed that they found that there had been negligence on the part of the driver of the omnibus in which he was a passenger. The case is an important one, inasmuch as it is in some degree novel, though somewhat similar in principle to *Bridge v. The Grand Junction Railway Company*, where, in case against a railway company for the negligent management of a train, whereby it ran against another train in which the plaintiff was a passenger, and injured him, a plea that the persons having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, *in part* by *their* negligence, the defendants' train did the mischief,—was held bad. The Court of Exchequer there seem to have thought,—though it was not necessary to decide it,—that, where there is negligence on both sides, the action cannot be maintained. Although I at one time entertained a contrary impression, upon further consideration I incline to think, that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the deceased himself had been driving, the case would have been quite free from doubt. So, there could have been no doubt, had the driver been employed to drive him, and no one else. On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, who, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable that actions of this sort are almost invariably brought against the rival carriage or vessel,—which is only to be accounted for by that party spirit which more or less enters into every transaction of life. If there is negligence on the part of those who have contracted to carry the

passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say, that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger. The passenger is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust. For these reasons, it seems to me that the direction of my brother *Williams* was quite correct, and that the rule should be discharged."

*Cresswell*, J. said :—

"I am of the same opinion. I must own I should not have been sorry if the point could have been raised upon a bill of exceptions. The subject is an important one, and ought to be definitively set at rest. I incline to think that the opinion thrown out by the Court of Exchequer in *Bridge v. The Grand Junction Railway Company*, is the correct one. If the driver of the omnibus the deceased was in, had, by his negligence, or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him, stands in any better position. For these reasons, I think the plaintiff in this case was not entitled to recover."

*V. Williams*, J. said :—

"I am of the same opinion. I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by." And here it may be observed that the occurrence of the injury itself (where the accident is not of a nature consistent with the abuse of negligence) is *prima facie* proof negligence *Bird v. The Great Northern Railway Company*.<sup>(f)</sup>

§ 15. There is a class of cases on which it may be necessary to remark, where the right to sue for misfeasance or nonfeasance arises from privity of contract between the parties. In the words of *Tindal*, C. J., in *Boorman v. Brown*.<sup>(u)</sup>

"That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of compe-

(f) 28 L. J. n. s. Exch. 3.

(u) 3 Q. B. R. 525. affd. 11. Cl. & F. p. 1.

tent skill or proper care in the service they undertake to render : actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions : and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff. And, as to the objection, that this election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance ; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a nonfeasance, the distinction between the two being, in that case, very fine and scarcely perceptible. But, further, the action of case upon tort very frequently occurs where there is a simple nonperformance of the contract, as in the ordinary instance of case against ship owners, simply, for not safely and securely delivering goods according to their bill of lading ; and as in the case of *Coggs v. Bernard*,<sup>(v)</sup> where an undertaking is stated in the declaration as the ground of action : and, to give no further instance, the case of *Mazzetti v. Williams*,<sup>(w)</sup> where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by Law.

“ The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.”

§ 16. Again where the act done affects the entire community, the public nature of the wrong as it were swallows up the private grievance : the lesser merges in the greater, and the remedy is by indictment : though if any individual have received a special injury from such act, he may have his civil action.<sup>(x)</sup> The ordinary illustration is this ; A cuts a trench across a high way. This is a public nuisance ; and indictment is the remedy. But if B falls into the ditch, and injure himself, an action will lie. Thus in *Daniels v. Potter*<sup>(y)</sup> an action was brought for negligently permitting the flap of the Defendant's cellar to remain unfastened, whereby it fell upon and broke

(v) 2 *Ld. Raym.* 909.

(w) 1 *B. & Ad.* 415.

(x) *Hardcastle v. The South Yorkshire Railway and River Don Company*, 5 *Jur. N.* 1, 150.

(y) 4 *C. and P.* 262.



the plaintiff's legs. It appeared in evidence that the flap was placed in a slanting position, on a projecting ledge, about a foot above the pavement; it was not fastened in any way, but merely leaned against the window of the defendant's warehouse and the house adjoining. One of the plaintiff's witnesses said, that the passing of a stage-coach or heavy waggon might have the effect of shaking it down. The defendant's witnesses stated, that the flap was pulled over by some boys who were playing about, and who, though warned by defendant's men, would not go away; and that the flap had been placed in the same way for many years, and that no accident had happened. *Tindal*, C. J. said:—

"The defendants were bound, in placing the flap, to use such precaution as would preserve it under all ordinary circumstances from falling down; but if it was so secured, and a third person over whom they had no control, came and removed it, then I think the defendants will not be liable. The plaintiff says, that the flap fell in consequence of the negligence of the defendants; the defendants' case is, that it was placed securely, and that a wrong-doer pulled it over on the plaintiff, and your verdict will be for the plaintiff or defendants according as you believe the one or the other of these stories. There is no doubt as to the Law of the case. The question for your consideration will be, whether upon this occasion the defendants, and their servants did use due and ordinary care in placing up this flap so as to prevent any accident from happening. It might certainly have been secured by a string, or by a hook, or by some person holding it, if that were necessary to the security of it. A tradesman under such circumstances is not bound to adopt the strictest means, but he is bound to use such care as any reasonable man looking at it would say is sufficient, and if he does use such care in the placing of the flap, and a wrong-doer comes and displaces it from the position in which it has been placed, it being that in which a careful man would place it, he will not be answerable in an action, but the party must look for compensation to such wrong-doer who so displaced it."

"The Jury found for the Plaintiff."

So, too, in *Proctor v. Harris*<sup>(s)</sup> where the action was brought against a publican for leaving open a trap door on the foot-pavement, in the evening, after the lamps were lighted. It appeared that the defendant had, immediately before the accident occurred,

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(s) 4. C. and P. 357.

been lowering a butt of beer into his cellar through this very aperture. *Tindal*, C. J., in summing up, said :—

“The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along these footpaths with ordinary security. It may be said, on the one hand, that these kinds of things must be, and that trade cannot be carried on without them ; but, on the other hand, it must be understood that as they are for the private advantage of the individual, he is bound to take proper care, when he is using his cellar, to prevent injury. With respect to the plaintiff, you will have to consider whether there was so little care and caution on his part, that he was himself guilty of negligence in running into the danger. If there has been sufficient light, most likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the nature of a nuisance, used in the manner it was, and whether, looking to all the circumstances the plaintiff fell in, owing to the negligence and carelessness of the defendant, in not sufficiently protecting the place at this hour, being after dark. If you think so, you will find for the plaintiff. But if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant.”

The rule is one of public policy and V. C. *Stuart* says in *Wickham v. Gatrill*<sup>(a)</sup> :—

“It has been decided again and again and it has been distinctly stated by Lord *Tenterden* in the case of *Stone v. Marsh*,<sup>(b)</sup> that when public policy ceases to operate the rule must cease also.”

In *Wickham v. Gatrill* a Banker's Clerk had misappropriated his master's funds—but the false entries were not discovered until after his death. The master having filed a Bill against the personal representatives of the Clerk for an account, the defendants demurred on the ground that the acts of the Clerk were felonious and therefore could not be made the ground of a suit in Equity. Held, that the Clerk having died before the felony was discovered, the rule of public policy never came into operation. Demurrer overruled with costs.

(a) 18 Jur. 768.

(b) 6 B. and Cr. 551.

§ 17. Further if the damages amount to a felony, the private remedy is suspended until public justice is vindicated : for otherwise compounding felonies would be at a premium. Many more would prefer their private interest to their public duty. But in *White v. Spettigue*<sup>(c)</sup> it was held that—

“An action of trover is maintainable to recover the value of goods which have been stolen from the plaintiff, and which the defendant has innocently purchased, although no steps have been taken to bring the thief to justice ; for the obligation which the law imposes on a person to prosecute the party who has stolen his goods, does not apply where the action is against a third party innocent of the felony.”<sup>(d)</sup>

§ 18. But it is not so in a case of mere *misdemeanor*, such as, assault, battery, or libel ; where the remedy is two-fold. Here the individual injured may pursue his public or private remedy at his option.

§ 19. It remains to make a few farther observations which may direct the Judge in dealing with the question of “damages.” “Damages,” says Mr. *Mayne*,<sup>(e)</sup>

“Are the pecuniary satisfaction which a plaintiff may obtain by success in an action. They may rise to almost any amount, or they may dwindle down to being merely nominal. They may be governed by rules so strict as to enable the Judge to dictate their amount as a matter of Law ; or they may be left, within loose limits, almost entirely to the discretion of the jury. It becomes, then a most important inquiry to ascertain the principles by which they are measured, and the species of evidence by which they may be aggravated or reduced. I propose, in the following work, first to state briefly the actions in which damages may be recovered ; then to examine the rules by which they are measured ; and finally to inquire into the practice which prevails in Westminster

(c) 13 M. and W. 603.

(d) A special case was sent up in the 4th Term of the year 1853 to the Supreme Court, from the Small Cause Court, to take the opinion of the Court as to the legality of a plaintiff suing to recover any chattel which he had pointed to the defendant and he had wrongfully appropriated, the 8th Sec. of the Breach of Trust Act (XIII of 1850) declaring such an act felony. The case was not argued, but *Bittleson, J.*, decided that a prosecution for felony was not a condition precedent to suing at Law, inasmuch as there was no *animus furandi* in the original taking. To have held that in every case of *Bailment* a *conversion* must be prosecuted criminally would have brought the affairs of life to a close. And in *Master v. Miller*, 13 M. L. C. 700, *Buller, J.*, expressly says that the rule has never been applied to any cases except torts. In a case before Mr. Justice *Bittleson* in the 4th Term of 1859, it was held that the act must clearly appear to be felony in order to stop the right of action. There parties had broken into a house, and carried away jewels, &c. : but it was in exercise of an asserted right of property. The plaintiff too had been to the Police, where he was referred to a Civil Suit.

(e) p. 1.

as to the pleading and assessment of damages, and to point out the cases in which the Court will review the decisions arrived at by a Jury."

§ 20. Let us now consider the principles which have been laid down for measuring damages in actions founded upon contracts and actions founded upon torts.

"In the case of contracts" writes Mr. *Mayne*,<sup>(f)</sup> "the measure of damages is much more strictly confined than in cases of tort. As a general rule, the primary and immediate result of the breach of contract can alone be looked to. Hence, in the case of non-payment of money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest of the money only. So where the contract is to deliver goods, replace stock, or convey an estate, the profit which the plaintiff might have made by the resale of the matter in question cannot in general be taken into account; nor the loss which he has suffered from the fact of his ulterior arrangements, made in expectation of the fulfilment of the bargain, being frustrated. The principle of all these cases seems to be, that, in matters of contract, the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. Now this benefit, the consideration for his promise, is always measured by the primary and intrinsic worth of the thing to be given for it, not by the ultimate profit which the party receiving it hopes to make when he has got it. A bottle of laudanum may save a man his life, or a seat in a railway carriage may enable him to make his fortune; but neither is paid for on this footing. The price is based on the market value of the thing sold. It operates as a liquidated estimate of the worth of the contract to both parties. It is obviously unfair, then, that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk."

§ 21. The rule with regard to the measure of damage in breaches of contract has been much considered in the case of *Hadley v. Baxendale*.<sup>(g)</sup> There the Plaintiffs were owners of a steam-mill. The shaft was broken, and they gave it to the defendant, a carrier, to bring to an engineer, to serve as a model for a new one. On making the contract, the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery, the shaft was kept

(f) p. 1.

(g) 9 Exch. 341, C. L. 18 Jur. 358.

back in consequence; and in an action for breach of contract they claimed as specific damages the loss of profits while the mill was kept idle. It was held that if the carrier had been made aware that a loss of profits would result from delay on his part, he would have been answerable. But as it did not appear he knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such an extent. The Court said,

"We think the proper rule in such a case as the present is this:—where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may fairly and substantially be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances for such a breach of contract. For had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

This rule was further illustrated in the case of *Fletcher v. Tyleur*.<sup>(A)</sup>

"The Defendant had contracted to build a ship, which was to be delivered to the Plaintiff on the 1st of August, 1854. It was not delivered till March, 1855. The vessel was intended by the plaintiffs, and from the nature of her fittings the defendant must have known the fact,—for a passenger ship in the Australian trade. Evidence was given

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(A) 17. C. B. 21.

that freights to Australia, were very high in July, August and September, but fell in October, and continued low till May, when the vessel sailed; and that had she been delivered on the day named, she could have earned £2,750 more than she did. On the other hand it was shown, that the plaintiffs would have extended the time for delivery till the 1st October, if the defendants would have bound themselves to that day under a demurrage (which however was refused); and that they had stated as their reason for wishing to have the ship then, that after that time the days would be shortening so fast, that they would be seriously inconvenienced and prejudiced in fitting the vessel out. The Judge charged in the words of *Hadley v. Baxendale* and the Jury found a verdict of £2,750. An attempt was made to set aside the verdict for excess of damages, on the ground that if the plaintiff's offer had been complied with, the loss of freight would have been suffered; and that the damages should be measured rather by the species of loss which they had themselves pointed out, than by that which they afterwards set up. The rule was refused."

On this case Mr. *Mayne* remarks<sup>(i)</sup> :—

"This case clearly does not go as far as *Hadley v. Baxendale*. The primary object of the ship was to earn freight by carrying passengers. The defendant was to be paid the value of such a ship. Any delay in its completion would clearly subject it to a diminution in value by a fall in freight. The measure of that diminution in value was accurately expressed by the difference in profits obtained on the first voyage. But suppose the plaintiff had told the defendant that he intended to send out his own goods in it to the Australian market, and that, in consequence of the delay, the goods had sold under prime cost, could the defendant have been charged with a loss which arose, not from any depreciation in the value of the ship, for which he had contracted, but in the value of goods, with which he had no connection?"

A new principle was suggested in this case by *Jervis, C. J.*, and *Willes, J.*

"The latter said it certainly is very desirable that these matters should be based upon certain and intelligible principles, and that the measure of damages for the breach of a contract for the delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money. No matter what the amount of inconvenience sustained by the plaintiff, in the case of non-payment of money, the measure of damages is the in-

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(i) p. 9.

terest of the money only; it might be a convenient rule if, as suggested by my Lord, the measure of damages in such a case as this was held, by analogy, to be the average profit made by the use of such a chattel."

And in *Randall v. Roper*.<sup>(j)</sup> There the Plaintiff had purchased barley seed from the Defendant with a warranty, and had sold it with similar warranty to sub-purchasers. The seed turned out badly. The Plaintiff was permitted to give in evidence the claims made against him by the sub-purchasers: Plaintiff had a verdict for £261-7-6. A motion was made to reduce the damages to £15 on the ground that the contingent damages were not the natural and probable result of the original contract. The motion was refused. *Erle, J.*, said—

"The question is what is the amount of damage to be recovered in respect of the breach of warranty. The natural and ordinary consequence of the breach of contract on a sale of seed barley is the difference of value of an inferior crop as compared with the crop which would have been grown had the barley been of proper quality; and therefore this is within the rule in *Hadley v. Baxendale*."

The Plaintiff however cannot recover what he has had to pay as damages for breach of his contract with another to deliver the article contracted to be delivered by Defendant to Plaintiff. *Tortman v. Middleton*.<sup>(k)</sup> But in an action against an Agent on an implied warranty that he had authority from the party on whose behalf he professed to act, Plaintiff may recover the costs of a Chancery suit brought by him against the principal and dismissed because such Agent had no authority. *Collin v. Wright*.<sup>(l)</sup>

§ 22. Except in cases of breach of promise of marriage the motives or conduct of a party in breaking the contract cannot be taken into consideration.<sup>(m)</sup>

§ 23. The rule in regard to actions of tort is wider than it is in respect to contracts. *Mr. Mayne* thus writes<sup>(n)</sup>:—

"Actions of tort, as we have observed before, are governed by far looser principles. Even here, however, in many cases the measure of damages is as accurately ascertainable as in actions on a contract. Torts

(j) Weekly Rep. 1858. Q. B. p. 445. 4 Jur. n. s. 663. See also *Shark v. Hislop*. 5 Jur. n. s. 730.

(k) 4. Jur. n. s. 689.

(l) 27 L. J. n. s. Q. B. 215.

(m) When by the conditions of sale the deposit is forfeited, the vendor can recover only the difference between the price and the deposit. *Oldenden v. Henry*, 27 L. J. n. s. Q. B. 861.

(n) p. 12.

are divisible into three classes; injuries to the property, person, or character. Those of the former class may be mingled with ingredients which will enhance the damages to any amount. For instance, a man's goods may be seized under circumstances which involve a charge of a criminal nature; or a trespass upon land may be attended with wanton insult to the owner. Any species of aggravation will of course give ground for additional damages. In general however injuries to property, when unattended by circumstances of this sort, and especially when they take place under a fancied right, are only visited with damages proportioned to the actual pecuniary loss sustained. On the other hand, where the person or character are injured, it is difficult, if not quite impossible to fix any limit, and the verdict is generally a resultant Of the opposing forces of the counsel on either side, tempered by such moderating remarks as the Judge may think the occasion requires."

§ 24. In regard to torts, motive may be taken into consideration: indeed it often forms the most important matter of consideration. Thus in actions for libel, defamation and the like, it is every day's practice to consider the motive with which the statement was published. So in cases of malicious prosecution, false imprisonment, and the like. In *Sears v. Lyons*,<sup>(c)</sup> where the Defendant threw poisoned barley on Plaintiff's premises in order to poison his poultry, the Jury were told they need not confine themselves to the damages actually sustained, but might consider the malicious motive of the Defendant. *Abbott, J.*, in summing up to the Jury,

"Cautioned them to guard against the hostile feelings which the evidence they had heard was likely to excite in their minds against the defendant. The action was brought for throwing poisoned barley upon the plaintiff's premises, and destroying his poultry; and it had been proved in evidence, that he had actually committed that injury; and that some of the fowls had died, although, whether from poison thrown on the plaintiff's premises or the defendant's did not appear. It had always been held, that for trespass and entry into the house or lands of the plaintiff, a jury might consider not only the mere pecuniary damage sustained by the plaintiff but also the intention with which the fact had been done, whether for insult or injury, and he said, that they were not confined in this case, to the mere damage resulting from throwing poisoned barley on the land of the plaintiff, but might consider also the object with which it was thrown, taking care at the same time to guard their feelings

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(c) 2 Starkie's Rep. 317.



against the impression likely to have been made by the defendant's conduct.

The jury found for the plaintiff, damages 50*l*."

These remarks show, that although the motive is to be taken into consideration, the damages are not to be *vindictive*.

§ 25. It is an important question often whether the damage proved is not too remote from the cause of action. It is necessary that the damage for which compensation is claimed should be the *natural* and *reasonable* consequences of the defendant's act. The maxim of the Law is *In jure non remota causa sed proxima spectatur*.<sup>(p)</sup> The question which the Judge should propose to himself is this<sup>(q)</sup>—

"Is the particular result such as might have been contemplated by

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(p) See the observations in 3 Jur. n. s. pt. 2. p. 99 on the important case of *Thompson v. Hopper*, 3. Jur. n. s. p. 133, in which it was held that the *efficient* cause is to be looked at. There Lord Campbell, C. J. said, "The maxim "*In jure non remota causa sed proxima spectatur*" is qualified by another legal maxim, "*Dolus circutitur non purgatur*;" and "*dolus*" means any wrongful act leading to the damage of another. This is well illustrated by the case of *Davis v. Garrett*, (6 Bing. 716). Action for not safely carrying lime for the plaintiff in the defendant's barge on a certain voyage, the declaration alleging that the barge deviated from the usual and proper course of the voyage, and by means thereof was assailed by a storm, and wrecked, whereby the lime was lost. In fact, the master of the barge did unnecessarily and wrongfully deviate from the usual and proper course of the voyage; during the deviation a tempest wetted the lime, and, the barge taking fire, the whole was lost. The defence was, that the loss did not arise directly and proximately from the deviations. But Tindal, C. J., said, (pp. 723, 724), "It is obvious that the legal consequences must be the same whether the loss was immediately by the sinking of the barge at once by a heavy sea when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. . . . We think that no wrong doer can be allowed to apportion or qualify his own wrong, and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done." So there was judgment for the plaintiff.

\* We are of opinion that the maxim relied upon can never be applied where it contravenes the fundamental rule of insurance law, that the insurers are not liable for a loss occasioned by the wrongful act of the insured. This rule is laid down in every case and treatise upon the subject. Of these we were very copiously reminded during the argument, and they need not now be more particularly referred to. Is it to be said, then, that to exempt the insurers from liability, the misconduct of the insured must be the direct and proximate cause of the loss? We think that for this purpose the misconduct need not be the *causa causans*, but that the insured cannot recover if their misconduct was *causa sine qua non*. In that case they have brought the misfortune upon themselves by their own misconduct, and they ought not to be indemnified. The very object of insurance is to indemnify against fortuitous losses, which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the efficient cause of the loss, the insurers are not liable."

(q) Mayne, p. 19.

the parties, as naturally flowing from the act done? The same question, upon the same principle, solves a number of other cases, in which profits do not come into consideration. For instance: the defendant libelled a concert singer, who, in consequence, refused to sing at the plaintiff's oratorio, for fear of being badly received. It was held that this damage to the plaintiff was not sufficiently connected with the act of the defendant to entitle the former to an action. It was said that the refusal to sing might have proceeded from groundless apprehension, or caprice, or some completely different cause. A still stronger case was where the defendant, by beating an actor, prevented his performing, and the injury to the manager of the theatre was also held to be too remote. The same principle has been applied in cases of slander, where the words used were not in themselves defamatory, though by a strained construction they were so understood. The plaintiff was a shopwoman, and the defendant had said of her, 'she secreted one shilling and six pence under the till; stating these are not times to be robbed.' In consequence of these words S. refused to employ her. It was held that no action lay. 'If S. refused to take the plaintiff into his service on this account, he acted without reasonable cause; and in order to make words actionable, they must be such that special damage may be the fair and natural result of them.' "

In the recent case of *Walker v. Goe*,<sup>(r)</sup> it was held that where an act of Parliament authorises Navigation Commissioners to lease works, and casts the duty of repairing on the Lessees, and in case they did not repair, authorised and required the Commissioners to give them notice to repair, and on their not repairing, authorised the Commissioners to take possession of the tolls and cause the repairs to be done themselves—no action was maintainable against the Commissioners for an injury to Plaintiff by the falling in of a lock, in consequence of the Lessees not doing the proper repairs, though no notice to repair was given. The falling in of the lock not being 'the natural necessary and proximate consequence of the not giving the notice to repair.'

§ 26. It often happens that what the Plaintiff claims is the profits which he *would have made*, if the Defendant had carried out his contract. Generally speaking, these are too uncertain; and a few instances will serve to show the operation of this rule.<sup>(s)</sup>

"The Defendant libelled a concert singer, who, in consequence, refused to sing at the plaintiff's oratorio, for fear of being badly received. It was held that this damage to the plaintiff was not sufficiently connected with the act of the defendant to entitle the former to an action.

(r) 5 Jur. n. s. 737.

(s) Mayne, p. 19.

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In *Tryer v. Tryer*<sup>(d)</sup> an action of detinue for not returning scrip, it was ruled by *Cresswell, J.*

"That no damages could be given for the loss sustained by the plaintiff in consequence of the detention of the shares having prevented his paying up deposits, which would have entitled him to an allotment of one thousand other shares, as this damage was too remote. So where an auctioneer entered into an agreement on behalf of defendant to sell premises to plaintiff, without having communicated the treaty to the former. The defendant had in the meantime sold to a third party. An action was brought for breach of contract, and the same learned judge held that no damages could be given for the loss of the plaintiff's bargain, saying 'his real loss is the loss of the use of the 30*l.* paid as deposit, and the expenses incurred by him to his attorney, and this, I think, is all that he can recover.'" "In another case," writes Mr. *Mayne* <sup>(e)</sup>: *Hanslip v. Padwick*,<sup>(e)</sup> "the contract was to demise a ferry and premises, and the plaintiff was promoter of a company provisionally registered for the purpose of working the ferry, and was also its solicitor. No title could be made out, and in an action against the vendor, it was held that the plaintiff could not recover for loss of profits from the granting of the lease, and the establishment of the association; nor the profits he would have derived from being employed as solicitor by the association, nor in respect of any advantage he would have derived from his time, labour, &c., employed in the formation of the association. There is one case, *Watson v. Ambergate Railway Company*,<sup>(w)</sup> in which there seems to have been a difference of opinion between two learned Judges. A prize had been offered

(d) 2 C. and K. 151.

(e) p. 16.

(v) Ex. 615.

(w) 15 Jur. 448.

for the best model of a machine for loading barges. The plaintiff had sent one by railway, but through the negligence of the defendant, it arrived too late, and the plaintiff lost his chance of the prize. A question arose as to the measure of damages, whether it was the value of the work and materials, or whether the prize might be taken into consideration." *Patteson*, J., seemed to think it might: he said,—“The plaintiff had put his damage upon a right principle, for he said the goods were made for a specific purpose, which had been defeated by the negligence of the defendant, and they have become useless.”

*Erle*, J., said :—

“I have had great doubts whether that chance was not too remote and contingent to be the subject of damages.” No decision was given, as the case went off upon a different point. “It is apprehended, however,” writes Mr. *Mayne*, “that the opinion of Mr. J. *Erle* was the true one. The question seems to come to this, was the plaintiff’s chance of winning the prize a matter of such an ascertainable value, at the time of entering into the contract of carriage, as to have been capable of contemplation by both parties? If it was not ascertainable then, it is difficult to see how it could have formed part of the contract, and if it did not form part of the contract, it could not enter into the damages for breach. Suppose the same carrier had been entrusted with all the models sent for competition, and delayed them all, should he pay the amount of the prize to each, or apportion it among them, or how? Even if the actual Judges gave evidence that a particular model would have won the prize, still this would be matter *ex post facto*, not known at the time of the bargain, and forming no part of it. The case is very like one alluded to by Lord *Ellenborough* as having been frequently mentioned by Lord *Alvanley*, where the plaintiff complained of false imprisonment, *per quod*, being confined on shore, he lost a lieutenancy. This was taken as an *ad absurdum* case. Would it have made any difference, if the plaintiff had been delayed in a train, when travelling to London to apply for his commission.”<sup>(x)</sup>

§ 27. A case illustrative of this last point has lately arisen. *Hamblin v. The Great Northern Railway Company*.<sup>(y)</sup> Where a passenger by a Railway train had been detained by the acts of the Railway so that he was forced to sleep at an inn that night, and could not keep his appointment at the place of his destination, it was held that he was only entitled to recover the price of his night’s lodging, his fare the next morning, and 1 shilling for nominal damages. There *Pollock*, C. B., said :—

(x) *Boyre v. Bayliffe*, 1. Cam. 53.

(y) 2 Jur. n. s. 1122.

"We are of opinion that this rule must be refused. The action is brought to recover damages for breach of contract. The case of a contract to marry has always been considered as a sort of exception to the rule regulating actions of contract; for in it the jury, when assessing damages, may take into account not merely the loss of an establishment in life, but to a certain extent also the injury done to the feelings of the party caused by the breach of the contract. But generally speaking the rule about damages is this—in the case of a wrong the damages are entirely for the jury, and they are at liberty to take into consideration the injury to the party's feelings, and the pain he has experienced, if the case were one of violence or assault. And many topics and many elements of damage arise in an action for tort or wrong of any kind, which certainly have no place whatever in an ordinary action of contract. Where you seek to recover damages for a breach of contract, it must be damages which are appreciable, and capable of being estimated, and all damages that are incapable of being either appreciated or estimated the Court does not consider a fit subject for a jury to give in that form of action. At the trial of the present case Mr. *Wilde* was invited to state what specific and special damage he claimed. My Brother *Martin* at the trial was very anxious on the subject, and said, 'If you will state to me what I am to put to the jury, I will put it to them if I think it is fit to be put.' Mr. *Wilde's* reply was, 'No; I ask for general damages for the breach of contract.' So, when Mr. *Wilde* made the present motion before us, we also, said, 'Tell us the specific damage that you say the plaintiff is entitled to recover more than the jury have awarded.' 'No,' he said, 'I decline to do that; what I claim is general damages; as every man must be entitled to some damage for a breach of contract.' No doubt he is; at all events he is entitled to nominal damages, and he is entitled to such other damage of a pecuniary kind as he can show he has really sustained. Mr. *Wilde* insists on it that he is at least entitled to some general damages, which are to be left to the jury to assess, almost according to their caprice, or at least according to the view they may take of the whole matter. Now, although there is no doubt that cases of this description are to be decided with reference to the peculiar circumstances that belong to each, still it may be laid down that generally no damages can be recovered ordinarily, i. e. generally, in an action of contract, that are not capable of being specifically stated, proved, and appreciated. We are, therefore, of opinion that the rule laid down by my Brother *Martin* at the trial of this cause was the correct view, that the plaintiff was entitled to recover what damages in the ordinary course of things resulted from the breach of contract, but that it was not matter to be left to the jury to say how

much they would award for a mere disappointment arising out of non-performance of the contract. Unless the damage or mischief complained of was the fair and natural result of the breach of contract, he is not entitled to recover it."

§ 28. A further illustration may be found in the case of *Fisher v. The Zemindar of Amenaikanoor* tried before the Madura Civil Court and in appeal before the Sudder in the year 1858. And the case of *Smeed v. Ford*<sup>(a)</sup> shows very forcibly what damages are natural, and what too remote. There,

"Plaintiff, a farmer, contracted with defendant, an agent for the sale of thrashing machines, for the purchase of a thrashing machine, to be delivered on the 14th August; defendant was aware of the particular purpose for which it was ordered. The machine was not delivered on that day, and plaintiff, being led by the promises of defendant to expect that it would be delivered from day to day, abstained from hiring one elsewhere:—Held, that plaintiff was entitled to recover, in an action against defendant, for loss sustained by injury to his wheat by a fall of rain, and for expenses incurred in carting the wheat and thatching it, and for the cost of kiln-drying it, but not for loss by a fall in the market price of wheat."

Lord Campbell, C. J., in delivering judgment said:—

"In this case there was an express contract that the machine should be delivered on the 14th August; but it was not delivered on that day, nor until long after; and the question is, whether, under the circumstances, the plaintiff is entitled to recover nominal damages only, or for the loss he has undoubtedly sustained. I take the rule on the subject as correctly laid down in *Hadley v. Baxendale*,<sup>(a)</sup> that a plaintiff under such circumstances as these is entitled to recover either such damages as may fairly and reasonably be considered as arising naturally and in the usual course of things from the breach of contract, or such as may reasonably be supposed to have been foreseen, and in the contemplation of both the parties at the time when they made the contract, as the probable result of the breach of it. That rule accords with *Pothier*, the *Code Napoleon*, and Chancellor *Kent*. I do not say how far it applies to the circumstances in *Hadley v. Baxendale*, or to the manner in which the verdict was entered in that case; but that is the rule laid down, and I entirely approve of it.

"We have to apply the rule to this case, which is not like the case of a horse, intended to run a race, sent by railway from London to Newmarket, and not delivered in time, whereby the horse lost the chance

(a) 5 Jar. N. S. 291.

(a) 9 Exch. 341, 354; 18. Jar. 358, 359.

of winning the race: nor like the case put by Lord *Ellenborough*, of a passenger travelling by coach delayed by the coach breaking down, *per quod* he lost his lieutenancy. In this case the damage flowed naturally from the breach of contract, and might reasonably be supposed to have been foreseen by the parties. The plaintiff was a farmer, and was known by the defendant to be a farmer, and to follow the practice of thrashing his wheat in the field, so that he might take it early to market. On the approach of harvest he contracted with the defendant to supply him with a thrashing machine on the 14th August, about the time when wheat would be expected to ripen. The defendant knew that the machine was to be used for that purpose. It must have been in the contemplation of the parties, that if the machine was not delivered at the stated time the corn might be injured by wet. It would not have been injured if the machine had been delivered in due time; it would have been carried into the granary or to the market in a sound state. But the rain came, and the wheat and straw were damaged; and that damage is a natural consequence from the non-delivery of the machine, and it might naturally be foreseen by the parties when they entered into the contract.

"It has been urged that the plaintiff ought to have hired a machine; and if that had been made out, it would have gone much in mitigation of damages. It appears that the defendant did not, after the breach of contract, offer to lend a machine to the plaintiff, but led him to suppose from time to time that he would send the machine ordered. Therefore there was no default on the part of the plaintiff in not hiring a machine.

"I think that the plaintiff is entitled to recover on the different items which are claimed as damage done by the falling of the rain after the corn had been reaped; they are all consequences which flowed naturally from the breach of contract, or might have been foreseen by the parties.

"But the claim in respect of the fall of the price of wheat in the market is different. It could not be considered either by the plaintiff or the defendant that the price of wheat would fall, nor is it a natural consequence of the breach of contract. I think, therefore, that on that head of damage the plaintiff is not entitled to recover."<sup>(b)</sup>

And *Crompton*, J., said:—

"This is the case of a contract for the purchase of an article for a

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(b) But the measure of damages on non-performance of contract by delivery of inferior goods, is the market price at time of delivery and amount realized. *Lodu v. Kekulé*. 4 Jur. N. S. 93.

particular purpose. It is clear that the damages must be such as arise naturally from the breach of contract; and we cannot complain of the language in the other branch of the rule, viz. that they must be such as may be reasonably supposed to be in the contemplation of both parties at the time when they made the contract, because that means what is natural, and what the parties naturally looked for."

§ 29. But profits *are* sometimes recoverable; that is to say where it is clear that the profits were the only thing contemplated by the bargain.

"There are many cases" says *Mr. Mayne*<sup>(c)</sup> "in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of that profit is strictly the measure of damages. When A. agrees to execute work for B., or to sell him goods, or hire him a ship at a future day, the benefit to A. is the profit following from the transaction, and to this he is entitled. But when the thing purchased is a specific article, and not the right to make a profit, the measure of damages will be the value of that article, or the difference between the contract price and that at which it could have been purchased elsewhere. The mere fact that some ulterior profit might have been made out of it cannot be considered, because such profit formed no part of the contract. This distinction has been very clearly pointed out in a case in the Supreme Court of New York.<sup>(d)</sup> The plaintiffs had contracted with the defendants to furnish marble from a specified quarry at a fixed sum for the erection of a City Hall. The plaintiffs entered into a contract with the proprietors of the quarry for the required amount at a smaller sum. After delivering a part of the marble the defendants refused to receive any more. The plaintiffs sued for breach of contract, and claimed as damages the profit they would have made by furnishing the marble at a larger sum than they were to pay for it. *Kent, J.*, ruled accordingly 'that the jury should allow the plaintiffs as much as the performance of the contract would have benefited them;' and this ruling was affirmed in the Court above. *Nelson, C. J.*, said, 'It is not to be denied, that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business to enter into a safe or reasonable estimate of damage. Thus any supposed successful operation the party might have made, if he had not been prevented from realising the proceeds of the contract, at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent

(c) p. 15.

(d) *Masterton v. Mayor of Brooklyn*, 7. Hill. 62.



issue of such an operation, in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. When the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith, and in expectation of the performance of the principal contract. But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. These are presumed to have been taken into consideration and deliberated upon, before the contract was made, and formed, perhaps, the only inducement to the arrangement.”

§ 30. So in tort; as the case of *Scott v. Shepherd* shows, the damages are not too remote if they are the *reasonable* consequences of the unlawful act. In *Piggot v. The Eastern Counties Railway Company*<sup>(e)</sup> which was an action for negligently firing the Plaintiff's premises contiguous to the line by sparks emitted from the engine, *Tindal*, C. J., said:—

“I am of opinion that this rule must be discharged. The defendants are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage: and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes. The evidence in this case was abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendants' engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think the jury came to a right conclusion, in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance, the case of *Mitchil v. Alestree*,<sup>(f)</sup> for an injury resulting to the plaintiff from the defendant's riding an unruly horse in *Lincoln's Inn Fields*; that of *Bayntime v.*

(e) 3 M. G. and S. 229.

(f) 1 Vent. 295.

*Sharp*,<sup>(g)</sup> for permitting a mad bull to be at large; and that of *Smith v. Pelah*,<sup>(h)</sup> for allowing a dog, known to be accustomed to bite, to go about unmuzzled. The precautions suggested by the witnesses called for the plaintiff in this case, may be compared to the muzzle in the case last referred to. The case of *Beaulieu v. Finglam*, in the Year Books<sup>(i)</sup> comes very near to this. There, the defendant was charged, in case, for so negligently keeping his fire as to occasion the destruction of the plaintiff's property adjoining. The duty there alleged was—"quare, cum secundum legem et consuetudinem regni nostri Angliæ, hactenus obtentam, quod quilibet de eodem regno ignem suum salvo et securè custodiat, et custodire teneatur, ne per ignem suum dampnum aliquod vicinis suis eveniat:" and there was no suggestion that it was necessary to define the particular sort of negligence that was complained of."

§ 31. The Judge cannot give more damages than what the Plaintiff has himself estimated them at. The maxim is, *Judex non reddat plus quam ipse petens requirit*. So in the case of *Sooriah Row, v. Cotagherry Boochiah*,<sup>(j)</sup> where the Plaintiff sued for a Mootah with mesne profits from her husband's death, she was limited to the sum laid in the plaint, though from the evidence it appeared that a larger sum was due. Therefore interest was disallowed because it was in excess of the sum claimed by the plaint.<sup>(k)</sup> So in our English Courts a Plaintiff cannot exceed the amount claimed by the particulars annexed to his plaint, though he may lay his damages in the plaint at a much larger sum.

§ 32. But he may of course give less. *Bracton* writes *Bene permittetur judici ex officio suo summam quam querens aestimat (cum agitur ex injuria) moderare et minuere, non autem augere*. And this leads us to a consideration of "mitigation of damages." There are some technical rules on this point arising from the English forms of pleading, which it is not necessary to notice. The inferiority of an article contracted for may always be shown; for otherwise the Defendant would be driven to his cross action, and litigation multiplied.

"It is settled" writes Mr. *Mayne*<sup>(l)</sup> "that whether the action is for the price of a specific chattel, or of unascertained goods, sold with a warranty, or is brought on a special contract to pay for goods or

(g) 1 *Lutw.* 90.

(h) 3 *Sira.* 1204.

(i) *P. 2 H. 4*, fo. 18, pl. 5; *ant.*, Vol. II. p. 689.

(j) 2 *Moores. J. A.* p. 113.

(k) But See *N. Kirkland v. Modet Pestonjes Khooridjee*, 3 *Moore's L. A.* 200, in which interest was allowed, though not prayed for, because according to custom at Bombay, a sum found due for mesne profits is a judgment debt and carries interest by its own force.

(l) p. 42.

work at a certain price ; or upon a *quantum meruit* for work and labour done, and materials found ; or for the value of the plaintiff's services ; the defendant may show the actual value of the goods, work, services, &c., and reduce the claim accordingly. So when a plaintiff contracts for a fixed sum to do work and find materials, and part of the work is afterwards done by the employer, or part of the materials are supplied by him, and used by the plaintiff, he is entitled to a deduction to this extent without pleading set-off. If it is part of the contract between a servant and his master, that the former is to pay out of his wages the value of his master's goods, lost by his negligence, this amounts to an agreement that the wages are to be paid only after deducting the value of the things lost. Such a state of things may be given in evidence under the general issue, and does not require a plea of set-off. And so where, by the custom of the hat trade, the amount of injury sustained by the hats in dyeing was deducted from the dyer's charges, evidence of injury from this cause was admitted in reduction of damages."

33. The rule is the same in regard to torts ; Mr. *Mayne*<sup>(\*)</sup> writes :

"On exactly the same principle, where the action is to recover damage for some loss arising from the defendant's acts, evidence is admissible to show that the injury is not so great as would at first appear. For instance, where the action was for breach of an agreement to build upon land, the defendant was allowed to show that the plaintiff had re-entered upon it under the covenant, and let it to another tenant. And where the plaintiff has given the defendant an indemnity against the very demand for which he is suing, such indemnity is a bar to the action, if it goes to the entire claim and of course would be admissible in reduction of damages if it only went to part. So in trover, though the cause of action is complete upon proof of conversion, still if the defendant after using the goods has returned them, or has paid over part of the proceeds to the plaintiff, this will go in reduction of damages. And in trespass against an executor *de son tort*, payments made by him in a due course of administration, and which go to exonerate the estate, shall be recouped in damages.

"So where the defendant has been in the wrong, but the injury resulting from his conduct has been increased by that of the plaintiff ; as for instance in an action against the Sheriff for an escape, if he has done any thing to aggravate the loss occasioned by the defendant's neglect, or has prevented him from re-taking the debtor, the damages would be materially affected by such conduct.

"Of course in all cases where motive may be ground of aggravation,

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(\*) p. 44.

evidence on this score will also be admissible in reduction of damages. Hence in an action for false imprisonment, evidence may be given of a reasonable suspicion that the plaintiff had been guilty of felony, without any attempt at setting up a justification. It is in the nature of an apology for the defendant's conduct. And so in cases of libel, the defendant may give any evidence in reduction of damages which goes to prove the absence of malice, or he may show previous provocation received from the plaintiff. And in actions of seduction, the offence may be deprived of its wanton and heartless aspect, by showing the loose character of the female."

The Court will not disturb a verdict giving nominal damages where the sum claimed is small, and no substantial damages proved. *Nicholl v. Bestorell.*<sup>(a)</sup>

§. 34. Sometimes the parties have by their own act, fixed at the time of their agreement, the precise amount at which they assess the damages for breach of the contract. In this case the damages are said to be "*liquidated*." Where it is clear that the parties have done this, the Judge has only to award the amount fixed: whether the term "*liquidated*" is used or not makes no difference. *Reynold v. Bridge.*<sup>(c)</sup>

"If," says Lord Campbell in *Mercer v. Irving*,<sup>(p)</sup> "there were an agreement between parties that on any infraction of the arrangement between them a certain sum should be paid whether that infraction was large or small, it would be valid at Law, and no Court of Equity would interfere to prevent the enforcement of it."

*Coleridge, J.*, says in the same case—

"The true rule is that the Court is to ascertain as well as it can from the language of the parties what their intention was in executing the instrument in question, all the cases are adverted to in *Reynold v. Bridge*. It is not easy to reconcile them and therefore we are justified in having recourse to this golden rule of construction."

If however such an agreement can be regarded as a *penalty* for the non-performance of the contract, the Judge is not tied down to give the precise amount named, but may award damages proportionable to the injury proved.

§ 35. Whether a sum mentioned in the agreement is to be regarded as a penalty or liquidated damages is a question of Law, and certain principles for determining the point have been laid down.

1st. Where the sum is expressly stated to be a *penalty*, and

(a) 28 L. T. N. S. Exch. 4.

(c) 6 El. and Bl. 528.

(p) 5 Jur. n. s. 148.

there are no words altering, controuling, or affecting this statement, the sum cannot be considered as liquidated damages. So in *Astley v. Weldon*,<sup>(g)</sup> Lord *Eldon* commenting on the case of *Sloman v. Waller*,<sup>(r)</sup> says—

“What was urged in the course of the argument has ever appeared to me to be the clearest principle, *viz.* that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. The case of *Sloman v. Waller* did not stand in need of this principle: for there by the very form of the instrument the sum appeared to be a penalty; in which case a Court of Equity could *never consider it as liquidated damages*, but must direct an issue of *quantum damnificatus*.”

2nd. Where the payment of a smaller sum is secured by a larger, the sum agreed on is *always* to be considered as a penalty. See the passage from *Astley v. Weldon* just cited.

3rd. Where articles contain covenants for the performance of *several* things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered a penalty.

The leading Case is *Kemble v. Farren*.<sup>(s)</sup> There the defendant had engaged to act as principal comedian at Covent Garden for four seasons, conforming in all things to the rules of the theatre. The plaintiff was to pay him 3*l.* 6*s.* 8*d.* every night the theatre was open, with other terms. The agreement contained a clause that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, &c., should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty, or penal sum or in the nature thereof. Notwithstanding these sweeping words, the Court decided that the sum must be taken to be a penalty, as it was not limited to those breaches which were of an uncertain nature and amount. And *Tindal*, C. J., said—

“It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1000*l.* should be taken as liquidated damages,

(g) 2 B. & P. 350.

(r) 6. Bing. 141.

(s) 1. Br. Ch. C. 418.

but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1000*l*. For we see nothing 'legal or unreasonable' in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the Plaintiff had neglected to make a single payment of 3*l*. 6*s*. 8*d*. per day, or on the other hand, the Defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case would have given the stipulated damages of 1000*l*. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to *all breaches of every kind*. We cannot, therefore, distinguish this case, in principle, from that of *Astley v. Weldon*, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of 200*l*., to be recovered in his Majesty's Court at *Westminster*. Here there was a distinct agreement, that the sum *stipulated should be liquidated and ascertained damages*: there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right

to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it."

4th. If the money be only payable on one event, and there exist no adequate means of ascertaining the damage that may result from a breach of contract, the parties may fix a sum as liquidated damages to avoid the difficulty. So in *Sainter v. Ferguson*,<sup>(1)</sup> where the defendant had entered into a contract with the Plaintiff not to practise as Surgeon or Apothecary at Mandesfield or within seven miles thereof under a *penalty* of £500. This was held *liquidated* damages, notwithstanding the contract expressed it to be a *penalty*: *Wild, C. J.*, said—

"The next question is, whether the 500*l.* mentioned in the agreement is to be considered as liquidated damages or not. That is a question which has sometimes been left to the jury. That course was adopted by *Best, C. J.*, in *Criedee v. Bolton*.<sup>(2)</sup> But it is now clearly settled, that, whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument. This agreement does not prohibit the defendant's doing several distinct and independent acts, each of which might be incapable of exact estimation: nor does it involve any of the circumstances that have, in any of the cases, induced the Court to hold the sum to be a penalty only. The whole object of the plaintiff was, to protect himself from a rival; and it would be impossible in such a case to say precisely what damage might result to him from a breach of the agreement: it is not unreasonable, therefore, that the parties should themselves fix and ascertain the sum that should be paid. And I think we can only give effect to the contract of the parties, by holding the 500*l.* to be liquidated damages, and not a mere penalty, and, consequently, that there ought to be no rule."

*Collman, J.*, said—

"As to the second point, I agree with the lord chief justice, that, although the word 'penalty,' which would *prima facie* exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement, and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of this agreement, and the difficulty the plaintiff would be under in shewing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages."

And *Cresswell, J.*, said—

"With respect to the damages, I concur in what has fallen from the

(1) 7 C. B. 717.

(2) 5 C. & P. 240.

lord chief justice and my brother *Collman*. If there be only one event upon which the money was to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty."

5th. The expression of the words 'liquidated damages,' on the other hand is not *conclusive* against the contract being construed as a penalty. If from the whole of the instrument the Court can see that there was no intention that the whole sum should become payable upon non-performance of any one stipulation, the words will be rejected and the contract treated as a penalty. In *Green Executor of Gosnell*,<sup>(e)</sup> v. *Price*. *Parke*, B. said—

"The principle is, that, although the parties may have used the term 'liquidated damages,' yet if the Court can see, upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words, and consider it as being in the nature of a penalty only."

§ 35. <sup>(w)</sup> It is perhaps to be regretted that Courts of Justice have not stood by the terms used by the parties. In *Asiley v. Weldon*, Lord *Eldon*<sup>(x)</sup> says—

"A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty though agreed to be paid in the form of contract. This has been said to have been stated in *Rolfe v. Peterson* where the tenant was restrained from stubbing up timber. But nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land, or wood on account of the amusement which it may afford him. In this country a man has a right to secure to himself a property in his amusements: and if he choose to stipulate for 5l. or 50l. additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply with propriety the word 'excessive' to the terms in which parties choose to contract with each other."

This has been cited by Lord *Brougham* with approval in the late case of *Ranger v. The Great Western Railway Company*<sup>(y)</sup> heard on appeal in the House of Lords. Lord *Cranworth* (Chancellor) in the course of his Judgment expressed himself as follows—

(e) 13 M. and W. 695. (w) 13. Jac. & W 695. (x) 2 Bos. & P. p. 351. (y) 18. Jur. 795.



"These penalties had certainly, according to the express language of the deed, been incurred, and therefore the point of decision is, whether there was anything, either in the nature of the penalty or the conduct of the parties, to prevent the company from insisting on the literal terms of the contract. There is no doubt that when the doing of any particular act is secured by a penalty, a Court of Equity in general is anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate, that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation. Whether a sum so fixed is to be considered as merely in the nature of a security for the actual amount of damage incurred, or as an agreed amount of liquidated damages, is often a question of great nicety and difficulty. I am not sure that benefit has, on the whole, resulted from the struggle which Courts, both at Law and in Equity, have made to relieve contracting parties from payments which they have bound themselves to make by way of penalty: such a course may have been very reasonable and useful where the damage resulting from the violation of the contract is capable of being exactly measured; but whenever the quantum of damage is in its nature uncertain, and the due performance of it has been secured, or purports to have been secured, by a penalty, it might perhaps have been safer and more convenient to have always understood the parties as meaning what their language imports, namely, that on failure to perform the contract the stipulated penalty should be paid. But this has not always been the doctrine of the Courts. The distinction between a penalty, and a sum fixed as the conventional amount of damage, is too well established to be now called in question, however difficult it may be to say, in any particular case, under which head the stipulation is to be classed."

And Lord Brougham said—

"My Lords, the last point upon which I have a word to say, in addition to the statement of my noble and learned friend, refers to the question of liquidated damages; and I greatly lament that the Law has been laid down by cases upon which it is too late to make any comment, except to express one's regret at its having been laid so down as to make it no other than a question, in every case, of the intention of the parties to decide whether the thing should be taken for a penalty or as liquidated damages; and I think this has been lamented formerly by learned judges; and although Lord Eldon very cautiously, as was his wont, expresses himself on this matter, yet it is impossible to read the leading case on the subject in the Court of Common Pleas during the

short time that that most learned judge sat in that Court—the case of *Asley v. Wheldon*—and it is impossible to read what fell from the noble and learned Lord in that case, without seeing that he was dissatisfied with the former current of cases. He expressed the great difficulty which he had often found in making his way through those cases, and I think there can be but little doubt that he lamented the course which the Law had taken. But, my Lords, it is now too late to alter this, and we are in every case bound to consider whether we are to grant liquidated damages or penalties, according to the principles that those cases had established. According to those principles I have no doubt whatever that in this case liquidated damages are due as regards the fourth prayer of the bill—I mean those injuries sustained by the company by the delay in a case in which that delay was increasing, and in which no specific sum could be apportioned in respect of a particular injury done to the company. In those cases I agree with my noble and learned friend that we must consider them as liquidated damages, as a compensation to the company for the loss sustained by the delay. In the other case it is equally clear, upon the principles laid down both in *Asley v. Wheldon*, to which I have referred, and also in a case which was referred to in 6 Bing., that it is to be taken as penalty. There can be no doubt that the Court from which this appeal comes went as far as possible in setting aside all reference to the intention of the parties, and they held, distinguishing between the different matters which were in the consideration of the parties when they entered into the covenant, that one was to be taken as liquidated damages and the other as penalty, although it was perfectly clear, as clear as words could make it, that the parties had intended the whole to be taken as liquidated damages, and not as penalty. The learned judge, in giving the decision of the Court, says, ‘It is difficult to suppose any words more explicit or express than those used in the agreement; the same declaration not only states affirmatively that the sum of 1000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature of a penalty.’ Yet nevertheless, because there were some things that were so specific, and others less specific and more general, the Court thought that they were bound by the current of cases to draw that distinction between the two, and that, in spite of the positive and distinct statement of the meaning of the parties, they were bound to consider that the parties did not mean that to be taken as to the whole, but only as to a part, and therefore to decide that a part of the sum should be penalty, although the party had said that none should be penalty, and that the other part should be liquidated damages, although the parties intended that this character should apply to the whole. My Lords, I cannot but regret that these refinements

have found their way into our law in consequence of the remedial act of the 8 & 9 Will. 3, respecting the relief of parties on bonds for the performance of a covenant, the penalty being by that act confined to the damage actually sustained by a breach of the covenant. Cases have occurred in which no great weight has been given to the remedy afforded by the act, the statute of Will. 3; and the Court has held in several cases, upon great consideration, that the party claiming compensation had no election to proceed paramount to the statute, or go to his remedy at common law, but that the statute was to be obeyed; they held that he had no election at all. I think it is that statute which has led to the decisions that have found their way into our law upon the doctrine of liquidated damages. However, my Lords, we have no choice in the instance that I have referred to, as to the fourth prayer of the bill, but to consider them as liquidated damages; and with regard to the other, we must consider them as in the nature of penalty."

The last case of importance on this subject is that of *Reynolds v. Bridge*.<sup>(s)</sup>

There *Erle*, Justice, said:—

"The nature of the contract is such that the damage resulting from breach of its stipulations is undefined. If the defendant, being in a well-favoured practice, covenants that he will not practise within certain limits, and he breaks that covenant in one or two instances only it is impossible to calculate the amount of the damage arising from such breaches: the plaintiff might be thereby prevented from attending a particular case, or from getting into a line of practice; and so it might be the loss of a fortune, or it might be only the loss of the amount of a particular bill. It is said to be a rule of law, that in some cases a stipulation for payment of a fixed sum counts for nothing, and that parties have put into their deeds words without any meaning; as in the case of a common bond given on a loan of money, in very early times, relief was given to the obligor, who could indemnify the obligee by payment of principal. And the Courts have extended the same principle to covenants where the damages for breach of covenant were fixed at a very large sum, by saying that the parties only intended that the sum due should be recoverable. But the tenor of the later decisions is to restrict the operation of that principle, because it militates against another great and governing principle of law, that parties may make what contracts they please within the limits of the law, and that such contracts shall be carried into effect by the Courts according to the intention of the parties, which is to be learnt from the

words in the contract. In some cases a large exercise of discretion has been assumed by the Courts to say, 'We will not take the words used by the parties, but look to the whole instrument, and give effect to it according to what we think would have been a reasonable contract for the parties to enter into.' But that borders on an absurdity; and if we take away the right of the complaining party to receive the damages which have been agreed upon, the party complained of may be liable to pay, not the extent of damages, which was limited according to his means, but an amount far exceeding that."

*Coleridge, J.*, said—

"The principle which the cases have established, without any great discrepancy, though there is not entire conformity, as to whether the sum agreed upon is to be regarded as liquidated damages or a penalty, is to ascertain what was the real intention of the parties; and the other rules which have been laid down are only to assist us in ascertaining that intention. The mere fact that the sum stated as liquidated damages is large and exaggerated in amount does not establish that it is a penalty."

The following deductions have been drawn from this judgment by the *Jurist*.<sup>(a)</sup>

"1. In deciding whether a sum to be paid, in the event of a breach of contract, is to be considered as in the nature of a penalty or as liquidated damages, the real intention of the parties is to be ascertained, and that from the words in the contract itself. Other rules upon the subject are only to assist the Courts in ascertaining such intention.

"2. The fact that the sum is large, and exaggerated in amount, does not of itself show that it is to be considered as a penalty.

"3. The fact that more than one thing is to be done or forborne does not determine the question.

"4. If the covenant relates to matters which are not of an uncertain nature and amount, e. g. for payment of a smaller sum, and the damages named in the deed are a much larger sum, it is to be regarded as a penalty.

"5. And it seems that if some of the stipulations are of a certain nature and amount, and some are of an uncertain nature and amount, as the sum cannot be treated as liquidated damages in respect of one of more of the stipulation, it ought not to be so treated in respect of the others. (Per *Coleridge, J.*) See *Galsworthy v. Strutt*.<sup>(b)</sup>

(a) 3. Jur. n. s. pt. 1. p. 116.

(b) 1. Exch. 660.

"6. If the parties intended that there should be a penalty recoverable over and over again for every breach of the covenant, and not that, in case of a single breach, the entire contract should be at an end, and the sum paid for the loss of the whole matter, it will in general be a penalty. (Per *Crompton, J.*)

"7. If there be a contract containing stipulations, the breach of which cannot be measured in damages, the parties must be taken to have meant that the sum agreed on for its non-performance was to be liquidated damages."

§ 36. So it is a general maxim of equity not to suffer advantage to be taken of a penalty or forfeiture when compensation meets the justice of the case.<sup>(c)</sup> On this ground stands the doctrine of mortgage, 'Once a mortgage always a mortgage.' Though the estate was forfeited at Law, if the money was not paid to the day; yet Equity, looking to the intention of the parties, rather than to the form of language in which it was couched; bearing in remembrance that the transaction was originally one of loan, and mindful that the necessities of the borrower should not be taken unfair advantage of, permitted him at any time to redeem the Estate on payment of principal, interest, and charges.

§ 37. The distinctions drawn in English law as to relief against particular classes of covenants in leases, and refused as to other covenants, it would be out of place to pursue here. But there are some points which it may be useful to notice, as of probable occurrence before the Judge even in this Country. Thus in public undertakings, as in Joint Stock Companies and the like, where the non-payment of calls has forfeited shares, no relief will be given; for the necessity of punctual payment is apparent; and if this were permitted, shareholders would hang back; and then by praying relief against the effect of their own intentional rashness throw the affairs of the Company into confusion; and indeed seriously impede, if not entirely defeat the operations of the partnership. Thus in *Sparks v. The Company of the Proprietors of the Liverpool Waterworks*,<sup>(d)</sup> Sir William Grant said:—

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(c) The foundation of this jurisdiction is "the original intent of the case"—and "the Court gives the party all that he expected or desired." *Peachy v. Duke of Somerset*, 1 Stra 447.

(d) 13 Ves. 498.

"This Bill is founded in Forfeiture; and upon the ground, that the Plaintiff did not consider himself as a Partner; and offering Compensation; and praying to be relieved from the Forfeiture. The Parties might contract upon any Terms they thought fit, and might impose Terms as arbitrary as they pleased. It is essential to such Transactions. This struck me as not like the case of Individuals. If this species of Equity is open to Parties engaged in these undertakings, they could not be carried on. It is essential, that the Money should be paid, and that they should know, what is their situation. Interest is not an adequate Compensation, even among Individuals; much less in these Undertakings. In particular Cases Interest might be a Compensation: but in the Majority of Cases it is no Compensation; from the uncertainty, in which they may be left. The effect is the same, whether Money has been paid, or not. They know the consequence. The Party, making default, is no longer a Member; but if a Party, can in Equity enter into a discussion of the Circumstances, each may bring his Suit. They must remain a considerable time, to see, whether a Suit will be begun; and before the Suit can be decided. They do not know, when any member will sue. If a Bill is to be permitted, there cannot be any certainty, that every member, who has made default, may not file a Bill? Can the Court impose a limitation of the period, when Bills may be filed? If the Court ever began to deal with these Cases, the number must be infinite. This is a mode which the party has, to withdraw from a losing concern. Why is not this Equity open to Contractors for the Government Loans? Why may not they come here to be relieved, when they have failed in making their deposit; and, if that they could have Relief, how could Government go on? It would be just as difficult for these Undertakings to go on. If compensation cannot be effectually made, it ought not to be attempted. It would be hazardous to entertain such a Bill."<sup>(e)</sup>

§ 38. Again, the principle is not applicable to the provision of an Act of Parliament, or of the Legislature, or of conditions in Law; relief can never be given against the provisions of a Statute; so in *Keating v. Sparrow*<sup>(f)</sup> Lord *Manners* said:—

"It has been argued on the Part of the Plaintiff, that this Court leans

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(e) Forfeitures, however, are *strictissimi juris* and parties who seek to enforce them must exactly pursue all that is necessary to be done in order to enable them to exercise the power *Clarks v. Hart*, 5 Jur. n. s. 447.

(f) 1. Ball & B 367.

against Forfeitures, if the Party can be compensated; and that he can in this Case, where interest and septennial Fines may be given to the Landlord. That Principle is applicable to Cases of Contract, between the Parties, but not to the Provisions of an Act of Parliament, or Conditions in Law. In *Peachy v. the Duke of Somerset* (g), Lord *Macclesfield* makes this Distinction: he says, Cases of Agreement, and Conditions of the Party, and of the Law, are certainly to be distinguished; you can never say the Law has determined hardly, but you may, that the Party has made a hard Bargain. The true Ground of Relief against Penalties is, when from the original Intent of the Case, the Penalty is only designed to secure the Money. Taking then the Principle from Lord *Macclesfield*, it is manifest that in Cases of mere Contract between Parties, this Court will relieve, when Compensation can be given, but against the Provisions of a Statute no Relief can be given."

§ 39. Equity will not permit a person to refuse specifically to perform his contract, *by electing* to pay the penalty for its non-performance.

"The general rule" says Lord *St. Leonards* (h) "of Equity, he observes, is that, if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to sell an estate, and execute his bond for £600, as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So, if a man covenant to abstain from doing a certain act, and agree, that, if he do it, he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; and, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract."

§ 40. But a distinction is observable between penalties, the true object of which is to secure the performance of the entire contract, and sums received as *additional* payment or price of doing a particular act: as for instance where a lessee covenants not to plough pasture land; *but if he does*, to pay an *additional* rent. Here, the entire contract for the lease is not affected by the stipulation, but it is in the nature of liquidated damages, a specific sum agreed upon between the parties as the price of doing a

(g) 1 Stra. 447.

(h) *French v. Macabe*, 2 Dr. and W. 274.

particular act. So in *Hardy v. Martin*<sup>(i)</sup> Lord *Roslyn* remarking on *Rolfe v. Peterson*<sup>(j)</sup>, which was such a case, said—

“That it was the demise of land to a lessee to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; that is a different case from an agreement not to do a thing, with a penalty for doing it.”

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(i) 1 Cox. 27.

(j) 2, Br. P. C. 436.



## TOPIC THE THIRTEENTH.

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DO UNTO OTHERS AS YOU MAY LAWFULLY DESIRE THEY  
SHOULD DO UNTO YOU.

*Sic utere tuo ut alienum non lædas.*

§ 1. The primary rights of property are comprised by the Roman Law in this and its fellow maxim; *Suum cuique tribuere*, which together make up the Law of *Meum* and *Tuum*; and express the whole duties of the citizen with respect to his enjoyment of his own, and his respect for his neighbours' property. Practically speaking, these two maxims make up the sum of the Great Christian Commandment 'Thou shalt love thy neighbour as thyself;' though they want the beautiful element of charity, expressed in the word 'Love'; and according to the notion of ancient philosophy and politics, they were not of that universal world-embracing obligation which characterizes the precept of the great Christian teacher. The ancients admitted, it is true, the duty of every man towards his neighbour; but the question, *who is my neighbour*, was a stumblingblock and an offence to them; and its solution, a shiboleth in their mouths. Thus, it was admitted that *Citizens* were bound by reciprocal rights and duties to each other; but *who was the Citizen*? Aristotle discusses this topic in his *Politics*; (a) he there shows how various opinions have been held upon the point: some maintaining that the citizen must be sprung, on both sides, father and mother, from Citizens; others, that a certain number of generations of citizenship are necessary to be proved; others that men enrolled from other states, enfranchised after revolution, or manumitted from slavery, are to be reckoned among the Citizens. Some question whether all classes in the same state are Citizens. Slaves were clearly not; whether Mechanics were, was doubted. The Citizens were neighbours, *inter se*; but the solution of this difficulty,—like most great discoveries, so simple that it seems to lie on the surface, and by a marvel to have escaped the acute intellects busi-

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(a) L. III. C. 2.

ed about it, was reserved for Christ.<sup>(b)</sup> He it was who first showed that the circle of *neighbourhood* was not a fixed figure, but carried about with him, like the horizon, by each traveller whithersoever he wandered, clipping in its circumference every individual with whom, for the time being, he happened to come in contact.

§ 2. *Domat* indeed deduces the whole Law from the two great Christian Commandments, to love God and our neighbour.

"From the love of God springs the obligatory force of the whole Law of nature, which is sanctioned by the will of Heaven, promulgated by nature itself; and upon that principle the duty of obedience to the natural Law is made independent of the hope of reward and the fear of punishment. From the duty of loving our neighbour spring all those obligations, the fulfilment of which is necessary for the welfare of mankind, and which we owe to our fellow-men as a consequence of the primary or of the secondary natural Law, including as part of the secondary natural Law the duty of obedience to municipal Law, without which obedience the social state either could not exist at all, or could not exist in tranquillity, or would not be capable of producing the greatest welfare of mankind, moral as well as physical."

In this sense how applicable is the saying of *Ulpian*; *Jurisprudentia est divinarum et humanarum rerum notitia*.

§ 3. There are many maxims regulative of the rights and duties of property which we should briefly enumerate, but they all resolve themselves unto so many illustrations of the principal doctrine.

§ 4. The leading maxim will be found well illustrated by *Broome*<sup>(c)</sup>; and it has already been incidentally touched upon in the Disquisition upon Damages.<sup>(d)</sup> A few more remarks however will not be thrown away here.

Thus, where my neighbour has acquired through long use a right to ancient windows, by which he enjoys the common blessings of light and air, I shall not so build on my own adjoining ground as to obstruct or diminish his enjoyment. *Ædificare in tuo proprio*

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(b) The Persian Scholar will remember that beautiful passage in the *Ghoolistan* :

بني آدم اعضاي يک ديگر اند

and will not require to be reminded that the happiest portions of that work are but so many elegant translations of Him who spake as never man spake.

(c) 274.

(d) Ante p. 105.

*solo non licet quod alteri noceat.*<sup>(e)</sup> On the same principle I am bound to use all proper care and diligence, that in pulling down my own buildings, I do not endanger the fall of my neighbour's house. Thus with respect to party walls, or walls adjoining each other. So of underground support; I may not work my own mines in such a way as to sap my neighbour's foundations.<sup>(f)</sup> In lopping hedges, cutting trees, &c. the work must be done so as not to encumber the neighbour's close. So I may not erect waterspouts which cause the rain to fall on my neighbour's lands. So I may not erect shambles to the detriment of my neighbour or his property, or carry on an offensive trade such as bone burning, tallow smelting, &c. Here the Law of Nuisance applies. And the Legislature has provided that factory chimnies shall be carried up a certain height, to carry the smoke above the atmosphere we ordinarily breathe.

§ 5. So with regard to the enjoyment of running water, a question of great importance in this Presidency.

"Each proprietor," says *Broome*,<sup>(g)</sup> "of the land has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purposes of his own, provided that they be not inconsistent with a similar right in the proprietor of the land above or below: so that neither can any proprietor above diminish the quantity or injure the quality of the water, which would otherwise naturally descend; nor can any proprietor below throw back the water without the license or the grant of the proprietor above. Where, therefore, the owner of land applies the stream running through it to the use of a mill newly erected, or to any other purpose, he may, if the stream is diverted or obstructed by the proprietor of land above, recover against such proprietor for the consequential injury to the mill; and the same principle seems to apply where the obstruction or diversion has taken place prior to the erection of the mill, unless, indeed, the owner of land higher up the stream has acquired a right to any particular mode of using the water by prescription, that is, by user continued until the presumption of a grant has arisen.

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(e) See observations, Jurist, Part 1 pt. 2. p. 131.

(f) Such was the Roman Law. *Non putare se ex tabernæ caseariæ fumum in superiora adificia jure immitti posse, nisi ei rei servitutem talem admittat. Idemque ait, et ex superiore in inferiora non aquam non quid aliud immitti licet. In suo enim alii hactenus facere licet, quatenus nihil in alienum immittat; fumi autem sicut aqua esse immisionem, posse igitur superiorem cum inferiore agere jus illi non esse id ita facere.*

(g) Leg. Max. p. 277.

“With respect to water flowing in a subterraneous course, it has been held, that, in this, the owner of land through which it flows has no right or interest, (at all events, in the absence of an uninterrupted user of the right for more than twenty years), which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry; for, according to the principle already stated, if a man digs a well in his own land, so close to the soil of his neighbour as to require the support of a rib of clay or of stone in his neighbour's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary, which is, in substance, the very case above stated.”

§ 6. It is impossible to illustrate this maxim more forcibly than by considering the case of running water flowing in a defined and natural channel, as rivers, streams, &c., when the riparian lands are already occupied.<sup>(4)</sup> There, each successive three occupants may be regarded thus. The uppermost must so use the water flowing through his lands as not to interfere with its enjoyment by those below him; the lowest must respect the same rule with regard to those above him, the middle occupant must respect the rights of the one above and the one below. Thus he could not pen back the water on the lands of the one above, or dam them up from flowing to the one below. The leading case on this subject is *Mason v. Hill*,<sup>(i)</sup> wherein the rights of the respective parties are well considered: there Lord Denman said:—

“The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream, flowing in its natural course, and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below—that neither

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(4) Observe however the distinction between the right which each riparian proprietor beside a natural running stream has, to have it few undiminished, unpolluted, through his land, and the right which a third party, a stranger, may have to the use of the water. It is the latter which constitutes an *Easement*, or *Profit à prendre*.

(i) 5 B. & Ad. 1.

can any proprietor above diminish the quantity, or injure the quality of the water, which would otherwise descend, nor can any proprietor below throw back the water without his license or grant:—and that, whether the loss by diversion, of the general benefit of such a stream, be or be not such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

“The proposition of the defendants is, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, *including* the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so, may altogether deprive him of the benefit of the water.

“In deciding this question, we might content ourselves by referring to, and relying on, the judgment of this Court in this case on the motion for a new trial,<sup>(j)</sup> but as the point is of importance, and the form in which it is now again presented to us leads to a belief that it will be carried to a court of error; we think it right to give the reasons for our judgment more at large.

“The position, that the first occupant of running water for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong doer: and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill: *Earl of Rutland v. Bowler*.<sup>(k)</sup> But it is a very different question whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied; and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unap-

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(j) 3 B. and Ad. 304.

(k) Palmer, 290.

appropriated stream of water with a fall, within its limits, might at any time be taken away; and, by partly of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another.

"We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealy v. Shaw* <sup>(1)</sup> *Saunders v. Newman*, <sup>(2)</sup> *Williams v. Morland*. <sup>(3)</sup> It appears to us also that the doctrine of *Blackstone* and the dicta of learned judges, both, in some of those cases and in that of *Cox v. Matthews*, <sup>(4)</sup> have been misconceived.

"In the case of *Bealy v. Shaw*, the point decided was, that the owner of land through which a natural stream ran (which was diminished in quantity, by having been in part appropriated to the use of works above, for twenty years and more, without objection) might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to that mill, by a further subsequent division of the water. This decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land *through which the stream flows*, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above, for a subsequent act, by which that benefit is diminished; and it does not in any degree support the position, that the first occupant of a stream of water has a right to it *against the proprietor of land below*. Lord *Ellenborough* distinctly lays down the rule of law to be that, 'independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water *in his own land*, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right.' Mr. Justice *Lawrence* confirms the opinion of Mr. Baron *Graham* on the trial, that 'persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream unless there existed before a right in others to enjoy or divert any part of it to their own use.' Mr. Justice *Le Blanc* in his judgment says as follows:— 'The true rule is, that after the erection of works, and the appropri-

(1) 6 East. 308.

(2) 1 B. and A. 248.

(3) 2 B. and C. 913.

(4) 1 Vent. 237.

ation by the owner of land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains, the first-mentioned owner, *however he might before such appropriation have taken to himself so much more* cannot do so afterwards;’ and this expression, in which, in truth, that learned judge cannot be considered as giving any opinion of the effect of a prior appropriation, is the only part of the case which has any tendency to support the doctrine contended for by the defendants.

“The case of *Saunders v. Newman* is no authority upon this question, and is cited only to show, that Mr. Justice *Holroyd* quotes the opinion of *Le Blanc, J.*, above mentioned; and he confirms it so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had a right of action for any subsequent alteration, to the prejudice of his mill; about which there is no question.

“The last and principal authority cited is that of *Williams v. Morland*.

“The case itself decides no more than this: that the plaintiff, having in his declaration complained that the defendants had, by a floodgate across the stream above, prevented the water from running in its regular course through the plaintiff’s land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff’s banks, could not recover, the jury having found that no *such* damage was sustained. The judgments of all the judges proceed upon this ground, though there are some observations made by my brother *Bayley*, which would seem at first sight to favour the proposition contended for by the defendants.

“These observations are, that ‘flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right, ought to show that he is prevented from having water which he has *acquired* a right to use for some beneficial purpose.

“The dictum of Lord Chief Justice *Tindal* in *Liggins v. Inge*, is to this effect:—‘Water flowing in a stream, it is well settled by the Law of *England*, is *publici juris*. By the *Roman Law*, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined, things, the property of which belongs to no person, but the use to all. And by the Law of *England*,

the person who first appropriates any part of this water *flowing through his land* to his own use, has the right to the use of so much as he then appropriates, against *any other* ;' and for that he cites *Bealy v. Shaw and others*, which case, however, is no authority for this position, as far as relates to the owner of the land below ; and probably, therefore, the Lord Chief Justice intended the expression 'any other' to apply only to those who diverted or obstructed the stream. To these dicta may be added the passage from *Blackstone's Commentaries*, vol. ii. 14 :—'There are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had ; and, therefore, they still belong to the first occupant, during the time he holds possession of them and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills and other conveniences : such, also, are the generality of those animals, which are said to be *fera natura*, or of a wild and untameable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance : but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.'

"And 2 *Blackstone's Commentaries*, p. 18 :—'Water is a moveable wandering thing, and must of necessity continue common by the law of nature ; so that I can only have a temporary, transient, usufructuary property therein ; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it.'

"None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the *Roman law*, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

"The *Roman law* is<sup>(p)</sup> as follows :—' *Et quidam naturali jure, communia sunt omnium hæc: aer, aqua profluens, et mare, et per hoc littora maris.*' It is worthy of remark that *Fleta* enumerating the *res communes. omnis*, ' *aqua profluens*,'<sup>(q)</sup> *Vinnius*, in his commentary on the in-

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(p) 2 Inst., tit. 1, s. 1.

(q) Lib. 3, ch. 1.



stitutions, explains the meaning of the text, '*Communia sunt quæ a naturâ ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt: Huc pertinent, præcipue aer et mare, quæ cum propter immensitatem, tum propter usum, quem in commune omnibus debent, jure gentium divisa non sunt, sed relictæ in suo jure, et esse primævo adeoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbribus collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremo propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem naturâ comparata sunt, tum si quid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione usus ille promiscuus non læditur.*' And he proceeds to describe the use of water, '*aqua profluens ad lavandum et potandum unicuique jure naturali concessa.*' The Law, as to rivers, is, '*flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque.*' And Vinnius, in his commentary on this passage says, '*unicuique licet in flumine publico navigare et piscari.*' And he proceeds to distinguish between a river and its water: the former being as it were a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable whilst it is there, of becoming the subject of property, like the air and sea.

"In the *Digest*, book 43, tit. 13, in public rivers whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12, distinguishes between public and private rivers; and in section 4, it is said that private rivers in no way differ from any other private place.

"From these authorities it seems that the *Roman Law* considered running water, not as a *bonum vacans*, in which any one might acquire property: but as public or common in *this sense only*, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only.

"We think that no other interpretation ought to be put upon the passage in *Blackstone*, and that the dicta of the learned judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our Law, nor as far as we know in the *Roman*

Law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.

"It remains to observe upon one case which was cited for the defendants (*Cox v. Matthew*), in which Lord *Hale* said, 'If a man hath a watercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say *antiquum molendinum*; and upon the evidence it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that *he used to turn* the stream as he saw cause; for *otherwise* he cannot justify it, though the mill be newly erected.' What is said by Lord *Hale* is perfectly consistent with the proposition insisted upon by the plaintiff; and the defendants in the supposed case would have no right to divert, unless they had gained it by prescription (which is the meaning of Lord *Hale*), or, according to the modern doctrine, until the presumption of a grant had arisen.

"And this view of the case accords with the Law, as laid down by Serjeant *Adair*, Chief Justice of *Chester*, in *Prescott v. Phillips*<sup>(r)</sup> and by Lord *Ellenborough* in *Bealg v. Shaw*, and by the Master of the Rolls in his luminous judgment in *Howard v. Wright*.

"We are, therefore, clearly of opinion that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the *Over Canal Springs* as well as the other injuries complained of; and for which damages have been assessed by the jury.

"As to the right to recover for the injury sustained, by the water being returned in a heated state, there can be no question.

"Whether he could have maintained an action *before* he had constructed his mill, or applied the water of the stream to some profitable purpose, we need not decide. It may be proper, however, to refer to two cases not cited in the argument. In *Palmer v. Kibblethwaite*,<sup>(s)</sup> the declaration merely stated that the water used, and ought to run to the plaintiff's mill, and Lord *Holt* said, 'Suppose a watercourse run to my ground and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? Must you not lay some use for it? But you will speak to it again.' In the report of the same case in *Skinner*, 65, *Pollexfen* in argument says he *took* it to be a clear case that the stream being the

(r) Cited 6 East, 213.

(s) 1 Show 64.

plaintiff's, the defendant could not divert it; and so held the Court, that an action had lain for diverting the stream though no mill had been erected. The final result of that case does not appear in the books, and the roll has been searched for in vain.

"In *Glynne v. Nicholas*,<sup>(f)</sup> a similar question was raised, which appears from the report of the same case in Comberbatch, 43, to have been decided for the plaintiff.

"It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown.

"But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court."

In *Embrey v. Owen*,<sup>(u)</sup> Parke, B., said :—

"This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side, to the reasonable enjoyment of the same gift of Providence.

"It is only, therefore, for an unreasonable and unauthorised use of this common benefit that an action will lie; for such an use it will, even, as the case above cited from the American Reports, (*Blanchard v. Miller*,<sup>(v)</sup> 268), shows, though there may be no actual damage to the plaintiff. In the part of *Kent's Commentaries*<sup>(w)</sup> to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his

(f) 2 Show 507.

(u) 6 Ex. 353.

(v) 8 Greenl. 268.

(w) 3 Comm. 439-445.

estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises, consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to a subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the Law requires of the party by or over whose land the stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. *Pothier* lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given by the Roman Law:—*'Sic enim debere quem meliorem agrum suum facere, ne vicini deteriores faciat.'*

"In America as may be referred from this extract, and as is stated in the judgment of the Court of Exchequer in *Wood v. Waud*(\*) a very

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(\*) 3 Ex. 781.

liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted. So in France, where every one may use it '*en bon père de famille et pour son plus grand avantage*.'<sup>(9)</sup> He may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused. In the above cited case of *Wood v. Waud*, it was observed, that in England it is not clear that an user to that extent would be permitted; nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand it could not be permitted, that the owner of a tract of many thousand acres of porous soil abutting upon part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream, than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in this, we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiff's right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream.

"We are, therefore, of opinion that there has been no injury, in fact or law, in this case, and consequently that the verdict for the defendant ought not to be disturbed.

"The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so long as the reasonable use, by one man,

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(9) *Code Civil*, art. 640, note (a) by Palliet (*Manuel de Droit Français*).

of this common property, does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building or plant a tree, near the house of another, without, in some degree, diminishing the quantity of light he enjoys: but such small interruptions give no right of action, for they are necessary incidents to the common enjoyment by all."

§ 7. It may be laid down therefore that each riparian proprietor has a right, whether he uses the stream or not, to have its natural conditions, within his own limits, preserved from a sensible disturbance arising from acts on the part of other riparian proprietors, whether above or below or on the opposite bank. Thus in *Sampson v. Hoddinott*,<sup>(e)</sup> *Cresswell, J.*, said:—

"It appears to us that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will. By usage they may acquire a right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user, by which it was acquired, affects the use that he himself has made of the stream or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural rights, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement.

"But if the user by the defendant has been beyond his natural right, it matters not how much the plaintiff has used the water, or whether he has used it at all. In either case his right has been equally invaded, and the action is maintainable.

"The question between the parties is thus reduced to this single point,—has the defendant used the water as any riparian proprietor may use it, or has he gone beyond that?

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(e) 3 Jur. n. s. 243.

"The general principle of law which in our opinion may be deduced from the decision of *Embrey v. Owen*,<sup>(a)</sup> and the authorities cited by *Parke, B.*, in delivering judgment in that case, is, that every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of other proprietors above or below on the stream."

§ 8. It is not necessary here to consider at any length the rights to the enjoyment of waters in other forms: that is to say, water flowing naturally without having a defined course, as springs, surface water, water in a tank, and the like: or waters flowing in an artificial channel whether the water flow from natural or artificial sources; or water in the sea, estuaries, or tidal rivers. But in this country it may happen that a man may occupy a stream and turn it to use, where there are neither occupants below or above him. For instance, a coffee planter erecting a mill upon a stream in the jungle which he has cleared, where the land above and below him is unoccupied. In such a case I conceive he would acquire a right as the first occupant, and by *user*, against those who might subsequently take up the lands either above or below him.

§ 9. Where water, arising within a defined channel, as in the bogs and marshes on the Neigherries, it belongs to the occupant of the adjacent lands exclusively: so with respect to percolating water, water overflowing and oozing down a road; then the adjacent occupant has a right to the use of the *entrety*: he injures no neighbour by the use of his own: and *a fortiori* is he entitled to the water separated from all other water, as in a pond, tank, or reservoir solely on his own land.

§ 10. Underground waters are subject to the same treatment as there which appear in the surface, according as they flow in a regular defined subterranean channels or simply lie genial under the soil. In the former case they cannot be interrupted to the prejudice of the owners of the superior and inferior estates; in the latter they may.

§ 11. The opinion of *Tindal, C. J.*, in the great case of *Acton v. Blundell*,<sup>(b)</sup> has thrown some doubt upon the question whether sub-

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(a) 6 Ex. 353.

(b) 19 M. and W. 324.

terranean streams are subject to the same rules as surface streams. But the recent case of *Chasemore v. Richards*.<sup>(c)</sup>

The case came on before the House of Lords from the Exchequer Chamber<sup>\*</sup> in error.<sup>(d)</sup> *Whitman*, J., in delivering the opinion of six of the judges, thus stated the case :—

“The plaintiff is the occupier of an ancient mill on the river Wandler and for more than sixty years before the present action he, and all the preceding occupiers of the mill, used, as of right, the flow of the river for the purpose of working their mill. It also appears that the river always has been supplied, above the plaintiff's mill, in part, by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the Wandle, part rising to the surface, and part finding its way underground in courses which continually vary. The Local Board of Health of Croydon (represented in this action by the defendant), for the purpose of supplying the town with water, and for other sanitary purposes, sunk a well in their own land in the towns and about a quarter of a mile from the river Wandle, and pumped up large quantities of water from their well for the supply of Croydon ; and by means of the well and the pumping, the Local Board of Health did divert and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the river, and so to the plaintiff's mill ; and the quantity so diverted and intercepted was sufficient to be of sensible value towards the working of the plaintiff's mill.

“The question is, whether the plaintiff can maintain an action against the Local Board of Health for this diversion and interception of the underground water.”

He proceeds :—

“The law respecting the right to water flowing in definite, visible channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the judgment of the Court of Exchequer, in *Embrey v. Owen*.<sup>(e)</sup> But the law, as laid down in those cases, is inapplicable to the case of subterranean water not flowing in any definite channel, nor indeed at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall.

(c) 3 Jur. n. s. 984. 7 W. R. 685. See 5 Jur. n. s. pt. 2, p. 323.

(d) See 5. W. A. 780.

(e) 6 Exch. 369.



"The inapplicability of the general law respecting rights to water in such a case has been recognised and observed upon by many judges whose opinions are of the greatest weight and authority.

And after discussing the authorities concludes.

"The question then is, whether the plaintiff has such a right as he claims *jure natura* to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affects the working of the plaintiff's mill. It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right.

"Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sunk a well upon his own land, and the amount of percolating water which found its way into it had no sensible effect upon the quantity of water in the river which ran to the plaintiff's mill, no action would be maintainable; but if many landowners sunk wells upon their own lands, and thereby absorbed so much of the percolating water, by the united effect of all the wells, as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them, and if any, which, for it is clear that no action could be maintained against them jointly?

"In the course of the argument Lord *Brougham* adverted to the French Artesian Well at the Abattoir de Grenelle, which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the defendant's well is drained from and percolates through an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rainwater as it fell into a pond; nor would he have a right to intercept its fall before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground, and flowed to the plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the river Wandle; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent

underground percolating water from finding its way into the river, and increasing its quantity, to the detriment of the plaintiff's mill. Such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable; and we therefore answer your Lordships' question in the negative."

Lord *Chelmsford* (Chancellor) said:—

"The question in this case is, whether the plaintiff in error is entitled to claim against the defendants the right to have the benefit of the rainwater which falls upon a district of many thousand acres in extent, and percolates through the strata to the river Wandle, increasing the supply of water in the river, and being of sensible value in and towards the working of an ancient mill belonging to the plaintiff. The acts of the defendants, by which this underground water was interrupted and prevented from finding its way into the river, were done upon their own land. It was conceded by the plaintiff in argument that a landowner had a limited and qualified right to appropriate water, the course of which is invisible and undefined, exactly to the same extent, and for the same purposes, as he would be entitled to use water flowing in a defined and visible channel. This, it was contended, must be confined to a reasonable use of the water for domestic and agricultural purposes; and, perhaps, it was said, according to the opinion of Chancellor *Kent*, for the purposes of manufacture; also it must further be admitted, and appeared to be so in argument, that in addition to the direct uses to which the water may be diverted, if in the regular course of mining operations, the percolation of underground water is arrested in its progress, and prevented reaching a point where it would have increased a supply which had previously been usefully employed by an adjoining landowner, he can maintain no action for the loss of the water, thus cut off from him. A distinction was suggested between such a use as the one last mentioned, where the interception of the water was merely the consequence of operation upon a party's own land, and the present, where the very end and object of the act done was to collect and appropriate the water; and upon the state of things existing in this case, a further distinction was insisted upon between a party sinking a well in his own land, either for domestic or agricultural or manufacturing purposes, and a public board or a water company doing the same thing for sanitary purposes, or for supplying the inhabitants of the neighbourhood with water. Before, however, the plaintiff can question the act of the defendants, or discuss with them the reasonableness of their claim to appropriate this underground

water for their own purposes, he must first establish his own right to have it pass freely to his mill, subject only to the qualified and restricted use of it to which each owner may be entitled through whose land it may make its way; and it seems to me that both principle and authority are opposed to such a right. The law as to water flowing in a certain and definite channel, has been conclusively settled by a series of decisions, in which the whole subject has been very fully and satisfactorily considered, and the relative rights and duties of riparian proprietors have been carefully adjusted and established. The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream, or in a subterranean channel; and I agree with the observation of Lord Chief Baron Pollock, in *Dickinson v. The Grand Junction Canal Company*, that "if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which in the natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limit, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods, or diminished by drought, it flows on in the same ascertained course, and the use, which every owner may claim, is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land through which the water filters cannot intercept it in its progress, can he prevent its descending to the earth at all by catching it in tanks or cisterns, and how far will the right to this water supply extend? In this case the water which ultimately finds its way to the river Wandle is strained through the soil of several thousand acres. Are the most distant landowners, as well as the adjacent ones, to be bound, at their peril, to take care to use their lands so as not to interrupt the oozing of the water through the soil to a greater extent than shall be necessary for their own actual wants? For, with Mr. Justice Coleridge, I do not see

'how the ignorance which the landowner has of the course of the springs below the surface, of the changes they undergo, and of the date of their commencement, is material, in respect of a right which does not grow out of the assent or acquiescence of the landowner, as in the case of a servitude, but out of the nature of the thing itself.' This distinction between water flowing in a definite channel, and water, whether above or underground, not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities and in uncertain directions, depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument. In *Rawstron v. Taylor*,<sup>(f)</sup> it was held, that in the case of common surface water rising out of spongy or boggy ground, and flowing in no definite channel, the landowner was entitled to get rid of it in any way he pleased, although it contributed to the supply of the plaintiff's mill. Mr. Baron *Parke*, in his judgment, observes, 'This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases.' And in *Broadbent v. Ramsbotham*,<sup>(g)</sup> it was decided that a landowner has a right to appropriate surface water which flows over his land in no definite channel, although the water is thereby prevented from reaching a brook, the stream of which had for more than fifty years worked the plaintiff's mill.—Baron *Alderson*, in delivering the judgment of the Court in that case, says, 'no doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which the water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already framed, but he has a perfect right to appropriate it before it arrives at such channel.' These cases apply to the right to surface water not flowing in any defined natural watercourse, but of course the principles they establish are equally, if not more strongly applicable to subterranean water of the same casual, undefined, and varying description."

Lord *Cranworth* said :—

"The right to running water has always been properly described as a natural right, just like the right to the air we breathe: they are the gifts of nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because running water is something

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<sup>(f)</sup> 11 Ex. 369.

<sup>(g)</sup> 2 Ex. 602.

visible, and no one can interrupt it without knowing whether he does or does not do injury to those who are above or below him. But if the doctrine were applied to water merely percolating, as it is said, through the soil, and eventually reaching some stream, it would be always a matter that would require the evidence of scientific men to state whether or not there has been interruption, and whether or not there has been injury. It is a process of nature not apparent; and therefore such percolating water has not received the protection, which water running in a natural channel on the surface has always received. If the argument of the plaintiff below were adopted, the consequence would be, that every well that ever was sunk would have given rise, or might give rise, to an action. It is said that in this case, this is not a well sunk by a particular individual for his own purposes, but a great well which has been sunk, and by which water is raised to a very enormous extent for supplying the whole town of Croydon. That argument does not affect my mind at all; because if it be conceded, as I think it must be conceded, that each and every one of the individuals residing upon this area might have sunk a well of his own to supply himself, it seems to me to be exactly the same thing whether the water is abstracted by one large well which supplies the whole community, or by a thousand small wells by which each individual of the community supplies himself. In truth, I should think that in all probability the loss of water would be much greater by each individual sinking a well, than by one great well being sunk for the supply of the whole community."

Lord *Wensleydale*, who gave his assent, expressed a desire to hear further argument. His reasons deserve study.

"The right to a natural stream flowing in a definite channel is not confined to streams on the surface; but the right to an underground stream flowing in a known and definite channel is equally a right *ex natura*, and an incident to the land itself, as a beneficial adjunct to it, as was determined in the case of *Wood v. Waud*.<sup>(A)</sup> If the river Wandle in this case had been supplied by natural streams flowing into the river above ground, or in known definite channels below ground, the cutting off those streams, to which the person entitled to the use of the river was entitled *ex natura* as feeders of the river, would be an injury to him, and give a right of action; and if this be true with regard to underground streams finding their way into the river, then comes the difficulty, how to distinguish the smaller rivulets and particles of water which flow and percolate into and supply the river. They are all equally the gift of nature for the benefit of the proprietors of the soil through

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(A) 3 Exch. 748.

and into which they flow. They are all flowing water, the property in which is not vested in the owner of the soil any more than the property in the water of a river which flows through it on the surface. In *Acton v. Blundell*, it is said, by *Tindall*, L. C. J., that the case 'rather falls within that principle which gives to the owner of the soil all that is beneath his surface—that the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water—that the person who owns the surface may dig therein, and apply all that he finds to his own purposes at his free will and pleasure.' If this applies to water underground naturally in course of transit (and it must do so to be applicable), and not to mere stagnant water, I agree with Sir *John Coleridge* in his remark, that the reason why it is the more the subject of property than the water flowing above ground is not explained. Surely the use of the flowing water in each case, and not the property in it, belongs to the proprietor of the surface. As to that part of Sir *John Coleridge's* opinion, in which he relies on the possession of the mill for thirty or sixty years, I think he is wrong. I do not think that the principle on which prescription rests can be applied. It has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years or upwards, '*qui non prohibet quod prohibere potest, assentire videtur.*' But how here could he prevent it? He could not bring an action against the adjoining proprietor; he could not be bound to dig a deep trench in his own land, to cut off the supplies of water, in order to indicate his dissent. It is going very far to say that a man must be at the expense of putting up a screen to window lights, to prevent a title being gained by twenty years' enjoyment of light passing through a window. But this case would go very far beyond that. I think that the enjoyment of the right to these natural streams cannot be supported by any length of enjoyment if it does not belong of natural right to the plaintiff. For the same reason I dispute the correctness of Lord *Ellenborough's* opinion in the case of the spring in *Balaton v. Bensted*, where there had been twenty years' enjoyment of it in a particular mode. The true foundation of the right is, that it is incident to the land *ex jure naturæ*. What then is the distinction between superficial streams and subterranean water? With respect to underground water percolating the strata, two considerations arise which make a material difference between it and the right to superficial streams. In the first place, these subterraneous waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used; and some mode of reducing into possession must be permitted by Law. If there be no

such right, underground water is comparatively useless. A man may therefore dig for his own supply, or make a well for his own use and that of his family, and in so doing, he may deprive his neighbour's land of moisture, and even of a copious spring, and prevent it from flowing to his neighbour's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbour, especially as the precise course and direction of such water can seldom be known accurately before hand. —In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and in so doing he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbourhood. In the civil law are to be found many instances in which it is allowed to cut off subterraneous supplies, if it is done in the cultivation of the soil. In the Digest<sup>(i)</sup> it is said, "*Denique Marcellus scribit, cum eo qui in suo fodiens, vicini fontem avertit, nihil posse agi; nec de dolo. Et sane actionem non debet habere, si non animo vicino nocendi sed suum agrum meliorem faciendi id fecit.*" And a very extensive sense is given to these words, authorising the improvement of the proprietor's own land in the civil law. In the Digest<sup>(j)</sup> "*De aqua et aquæ pluvie arcenda,*" it is said that the making a work, "*agri colendi causâ, et frugum quærendarum causâ,*" and thereby altering the course of the *aqua pluvia*, is not actionable. The term "*fruges*" is said to be the same as rent, "*non solum quod frumentis aut leguminibus; verum et quod ex vino, sylvis cadinis, cretifodinis, lapidicinis, capitur.*"<sup>(k)</sup> It would seem, therefore, that if the sources of a fountain or spring in an adjoining piece of land, were cut off by excavating in order to get the minerals in any place, it would be deemed by the Roman Law to fall within the principle of the improvement of the land, and not to be actionable. The case of *Acton v. Blundell* would be rightly decided upon this ground, because the injury to the plaintiff's well was caused by the lawful exercise of the defendant's right to get the minerals in his land, and unless he had that right, the public would have lost the benefit of a valuable gift of Providence. I come to the conclusion that every man has a right to the natural advantages of his soil—the plaintiff to the benefit of the flow of water in the river and its natural supplies; the defendant to the enjoyment of his land, and to the underground waters on it; and he may, in order to obtain that water, sink a well. But, according to the rule of reason and Law

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(i) Lib. 39, tit. 3, Pothier's ed., vol. 3, p. 578.

(j) Lib. 39, tit. 3.

(k) Article 9, see Pothier's Dig. 3,791.

"*sic utere tuo ut ne alterius lædas*," it seems right to hold that he ought to exercise his right in a reasonable manner, with as little injury to his neighbour's rights as may be. The civil Law deems an act, otherwise unlawful in itself, illegal, if done with a malicious intent of injuring a neighbour, "*animo vicini nocendi*." The same principle is adopted in the Laws of Scotland, where an otherwise lawful act is forbidden, if done *amulatione vicini*; Bell's Princ. s. 966. The question in this case, therefore, as it seems to me, resolves itself into an inquiry whether the defendants exercised their right of enjoying the subterraneous waters in a reasonable manner. Had they made the well, and used their stream-engines for the supply of water for the use of their own property and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the property had been proportionately augmented, there could have been no just ground for complaint. But I doubt very much the legality of the defendants' acts, in abstracting water for the use of a large district in the neighbourhood unconnected with their estate, who would have no right to take it directly themselves and to the injury of those neighbouring proprietors, who have an equal right with themselves. It does not follow that each person who was supplied with water by the defendants could have dug a well himself on his own land, and taken the like quantity of water. So that the defendants may have taken much more than would have been abstracted if each had exercised his own right. The same objection would not apply to the abstracting of water for the use of the dwellers on the defendants' land even though they carried on trades requiring more water (brewers, for example) than would be used for mere domestic purposes. It would still be for their purposes only—but in this case there has been an abstraction of water for purposes wholly unconnected with the enjoyment of the defendant's land. On the whole, I should certainly have wished to give this important case further consideration, but as my noble and learned friends have formed their opinions upon it, I acquiesce, and do not give my advice to your Lordships to reverse the judgment."

The principles established by this important case are:—

1st. The right to the continual flow of running water is a natural right incident to property in adjoining land, and does not depend on prescription.

2nd. This right exists whenever the water flows in a known and defined course, whether it be on the surface or underground.



3rd. But no such right can be claimed in respect of underground water not proceeding in any defined course, but percolating through the soil, although it may ultimately reach a definite visible stream.

§ 12. Though the subject is not exactly illustrative of the present topic, the notice of these rights of water would be hardly complete without touching on the right of accretion, the *jus alluvionis*, which occurs frequently on the banks of our larger rivers, where land is constantly being swept away on one side and thrown up on the other, or in the form of islands. Mr. *Forbes* of *Dacca* in his evidence before the Colonization Committee gives an instance of the Government claiming an entire estate *jure alluvionis*. The water first washed away part of the estate, which re-appeared in the shape of an island; this the Government claimed because it was an island; shortly after the rest of the estate followed, and formed on to the island; this was also claimed as an accretion. *Blackstone* thus states the Law.<sup>(f)</sup>

"So also in some cases, where the Laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the Law of England assigns them an immediate owner. For *Bracton* tells us <sup>(m)</sup>, that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil Law.<sup>(n)</sup> Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores: for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed,<sup>(o)</sup> there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the sea, though the civil law gives it to the first occupant,<sup>(p)</sup> yet ours gives it to the king.<sup>(q)</sup> And as to lands gained from the sea, either by *alluvion* by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the Law is held to be, that if this gain be by little and little, by small and im-

(f) Book 2. p. 261.

(m) L. 2. c. 2.

(n) Inst. 2. 1. 23.

(o) Salk. 637. See page 39.

(p) Inst. 2. 1. 13.

(q) Bract. L. 2. c. 2. Callis of Sewers.

perceptible degrees, it shall go to the owner of the land adjoining.<sup>(r)</sup> For *de minimis non curat lex*: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge of loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry.<sup>(s)</sup> So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's, or the subject's property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss.<sup>(t)</sup> And this law of alluvions and derelictions, with regard to rivers, is nearly the same in the imperial law<sup>(u)</sup>; from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before-mentioned, as upon this other general ground of prerogative, which was formerly remarked,<sup>(v)</sup> that whatever hath no other owner is vested by Law in the king."

§ 13. And as to maritime accretions, Lord Hale in his work '*De Jure Maris*' says:—

"This *jus alluvionis*; as I have before said, is, *de jure communi*, by the Law of England, the king's, viz. if by any marks or measures it can be known what is so gained, for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*, as well in maritime increases as in the increases by inland rivers."

§ 14. The Law with respect to artificial streams such as channels and water courses affords a strong illustration of this Maxim.

"In cases of this kind," writes Mr. Phear, "it is convenient to term the stream an *artificial stream*, and when considering the relations subsisting between the various riparian proprietors, it must be remembered that they are necessarily subservient to the right of those persons, for whose benefit the

(r) 2 Roll. Abr. 170. Dyer. 326.

(s) Callis. 24, 28.

(t) *Ibid.* 28.

(u) *Inst.* 2. 1, 20, 21, 23, 23, 24.

(v) See Vol. I. pag. 293.

existence, or at any rate, the present state of the stream was brought about, to reap the advantages intended for them. Each owner of land which borders upon such a stream is bound by positive duty to receive it under such circumstances, as to quantity and quality, and generally to submit to such disadvantages,<sup>(w)</sup> in relation to the maintenance of the stream, as its beneficiaries have a right, either by statute or otherwise, to impose upon him; and if it was originally a natural flow of water, his own rights will follow after this duty, as far as they are not inconsistent with it; but if the water come from artificial sources<sup>(x)</sup> he can then claim no right, by reason of the stream passing through his land, except the negative right of being protected from any increase of his burden at the hands, either of the other proprietors, or of the owners and beneficiaries of the artificial stream.

"In other words, as regards the artificial stream, or the artificial condition of a natural stream, as the case may be, the proprietor of the land through which it passes, is subject to an easement, the nature of which is defined solely by contract between him and the person entitled to its enjoyment; but to no one else is he under any obligations in respect of it. The simple fact, that an artificial stream passes through the lands of A. and B., respectively, does not render it, like a stream existing naturally, a common subject of property for A. and B.; they have no rights between each other in reference to it considered as a stream; each may treat it as his own absolute property, subject only to the condition under which he must enjoy every other portion of his property, namely, the observance of the maxim, *Sic utere tuo ut alienum non ladas*. Thus, supposing the artificial stream in question to be a sort of sewer or cut, for carrying off dye water,<sup>(y)</sup> &c., from the premises of a certain manufacturer, say M., then both A. and B. have an express contract, whatever it may be, with M., in reference to the passage of the dye water through their respective lands, but not, necessarily any whatever with each other: each of them, as A., is bound to receive it when it comes to him, but having done this, he may keep possession of it, and consume it if he finds it useful, say, for instance, as liquid manure; and this, notwithstanding that his lower neighbours, B. and C., can make as advantageous use of it as himself, and are anxious to have it for that purpose. If, however, A. permits it to pass to B, he must not increase its volume or impurity by discharge from his own premises, or in any way alter its character; he can do nothing to

(w) *Stainton v. Woolrych*, 23 Beav. 225. See also *Boslock v. North Staffordshire Railway*, 4 K. and B. 798.

(x) *Wood v. Waud*, 3 Ex. 779.

(y) *Sharp v. Waterhouse*, 3 Ju. n. s. Q. B. 1022.

affect the actual condition of B.'s land, except as M.'s agent, and, therefore, within the terms of M.'s contract. It should be remembered in connection with these points, that while, for the reasons already dwelt upon, stopping the waters of a natural stream is a direct interference with the property of lower riparian landowners, the contrary is the case with other waters, which in fact, belong in no sense to any other person than the owner of the land upon which they are for the time being.

"Of course B. may enter into an express contract with either M. or A. that a certain quantity of dye water shall be continually sent down to him, or he may acquire<sup>(2)</sup> a right to this, or to any greater extent, by any of the various modes of acquisition which will form the subject of consideration in later sections. But even in such case, if B.'s contract were with M. only, he would have no power to prevent A. from interrupting the water, if he chose."

§ 15. So with regard to dangerous instruments; if a man will keep them about his premises, he must take all due caution that they shall not cause injury to others. Where, therefore, defendant, in the case of *Dixon v. Bell*,<sup>(a)</sup> being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off; it was held, that the defendant was liable to damages in an action on the case. "If," observes Lord Denman, delivering the judgment of the Court of Queen's Bench in *Lynch v. Nurdin*,

"I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third; and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." "In the case referred to," writes Mr. Broome, "the evidence showed that the defendant had negligently left his horse and cart unattended in the street; and that plaintiff, a child seven years old, having got upon the cart in play, another child incautiously led the horse on, whereby plaintiff was thrown down and hurt; and, in answer to the argument, that plaintiff could not recover, having, by his own act, contributed to the accident, it was observed, that the plaintiff, although acting without prudence or thought, had shown these qualities in as great

(2) *Sharp v. Waterhouse*, 3 Ju., n. s. Q. B. 102

(a) 1. Stark 287

a degree as he could be expected to possess them, and that his misconduct, at all events, bore no proportion to that of the defendant. The established rule, indeed, applicable to such cases is, that the mere want of a superior degree of skill or care cannot be set up as a bar to the plaintiff's claim for redress; and that, although the plaintiff may himself have been guilty of negligence, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he will be entitled to recover; if, by ordinary care, he might have avoided them, he must be considered as the author of his own wrong. Ordinary care, it has, moreover, been observed, must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation; and, in the absence of such ordinary care on the part of the plaintiff, the case will fall within and be governed by the general rule of the English Law, that no one can maintain an action for a wrong where he has consented or contributed to the act which occasions his loss.

"It is not, however, true as a general proposition, that misconduct, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue; and against such general proposition the case of *Bird v. Holbrook* is a decisive authority. In that case, the defendant, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot and seriously injured, the defendant was held liable in damages. It was, indeed, observed, in a very recent case, that this decision proceeded on the ground, that setting spring-gun without notice was, even independently of the statute, an unlawful act; but, it was likewise remarked, that, although the correctness of such a position might perhaps be questioned, yet, if it were sound, the above decision was correct: and, on the whole, we may, it seems, conclude with reference to this subject, that although the law, in certain cases, forbids the setting of instruments capable of causing injury to man, where such injury will be a probable consequence of setting them, yet, with the exception of those cases, a man has a right to do what he pleases with his own land."

Those who wish to pursue this topic further will find an able discussion of the right in the *Attorney General v. Chambers*.<sup>(b)</sup>

§ 16. This principle receives considerable illustration from many recent cases in which injury has happened to workmen from machinery, dangerous employment, negligence of fellow workmen, and the like. It was formerly held that a master was not ge-

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(b) 5. Jur. N. S. p. 743.

nerally liable for an injury sustained by one of his servants through the negligence of a fellow servant employed in the same work. This was laid down in *Priestly v. Fowler*,<sup>(c)</sup> but the authority of this case was somewhat shaken till the recent case of the *Barton's Hill Coal Company v. Reed*,<sup>(d)</sup> and *Same v. M'Guire*,<sup>(e)</sup> confirmed it. A master is bound to take all reasonable precautions to secure the safety of his workmen; in other words he must so use his own as not to injure another. Thus in *Brydon v. Stewart*,<sup>(f)</sup> it was held that the owner of a mine who lets a workman down, is bound to bring him up safely, even though he be leaving the mine on his own, and not his master's business.

§ 17. But when reasonable care is taken to guard against ordinary accidents, no liability arises from extraordinary. Therefore in *Blyth v. Birmingham Water Works Company*,<sup>(g)</sup> where a company, incorporated for supplying a street with water, constructed their apparatus according to the best known system, and kept it in proper repair for twenty-five years, at the end of which time a frost of unusual severity acted on the apparatus, so as to cause injury to the property of another person: the Company was not held liable for negligence.

Negligence in that case was well defined by *Alderson, B.* He said it "consists in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing, unintentionally, mischief to a third party."<sup>(h)</sup>

§ 18. The case of *Degg, Administratrix &c., v. Midland Railway Company*,<sup>(i)</sup> also throws light upon this topic. There *Bramwell, B.*, delivering the judgment of the Court said:—

"The facts stated by the declaration and the plea demurred to may be thus summed up:—The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway, in their service, with those carriages and engines; the deceased voluntarily assisted some of them in their work; others of the defendants' servants were negligent about their work, and by reason thereof the deceased was killed; the defendants' servants were persons competent to do the work; the defendants did not authorise the negligence.

(c) 3. M. and W. L.

(d) 4 Jur. n. s. pt. 1, p. 767.

(e) Ibid 772.

(f) 2 Macq. H. L. Cas. 60.

(g) 2 Jur. N. S. 333.

(h) And see Observations, 4 Jur. pt. 2, p. 401.

(i) 3. Jur. n. s. 395.

"We are of opinion that under these circumstances the action is not maintainable. The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable; and it might be enough for us to say that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services, can have any greater rights, or impose any greater duty on the defendants, than would have existed had he been a hired servant. But we were pressed by an expression, to be found in those cases, to the effect, that a servant undertakes, as between him and the master, to run all ordinary risks of the service, including the negligence of "a fellow-servant:"<sup>(j)</sup> and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself, from the negligence of his fellow-workmen, as it would be if he were paid for his services.

"But we were also told that there was and could be no agreement; that *Degg* was a wrong-doer, and therefore the action was maintainable. It certainly would be strange that the case should be better if he were a wrong-doer than if he had not been. We are of opinion that this argument cannot be supported. We desire not to be understood as laying down any general proposition, that a wrong-doer never can maintain an action. If a man commits a trespass to land, the occupier is not justified in shooting him; and probably, if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fire carelessly and hurt him, an action would lie. Nor do we desire to give any opinion on the cases cited of *Bird v. Hoolbrook*<sup>(k)</sup> and *Lynch v. Nardin*,<sup>(l)</sup> but it is obvious and a truism to say that a wrong-doer cannot, any more than one who is not a wrong-doer, maintain an action, unless he has a right to complain of the act causing the injury, and complain thereof against the person he has made defendant in the action. Now, it may be, that had the mischief here resulted from the personal act of the master, he, knowing that the deceased was there, the master would have been liable; and that, as the defendant's servants knew the deceased was on the railway, and because they knew that, were guilty of a wrong to him, they are liable to an action; but, on what reason or principle should the defendants be? If a servant is driving his master in a carriage, and a person gets up behind, and the servant, knowing it, drives carelessly and injures that person, the servant may be liable, but why the master? The law, for reasons of supposed conveni-

(j) *Winget v. Per*, 11 Exch. 832.

(k) 4 Bing. 623.

(l) 1 Q. B. 29.

ence more than on principle, makes a master liable in certain cases for the acts of his servants—not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets, when damage is thereby done. This is a responsibility the law has put on them; there is a duty on them to take care that their servants do no damage to other by negligence in their work for their master, or to compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrong-doer have power to create such a responsibility and such a duty? No reason can be assigned. Some acts are absolutely and intrinsically wrong, where they directly and necessarily do an injury, as a blow; others only so from their probable consequences. There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place or person. It is not negligent or wrong for a man to fire at a mark in his own grounds at a distance from others, or to ride very rapidly in his own park; but it is wrong so to fire near to, and so to ride on, the public highway; and though the quality of the act is not altered, it is wrong in whoever does it, and so far it is as though it were intrinsically wrong. So the act of firing or riding fast in an inclosure becomes wrong, if the person doing it, sees there is some one near, whom it may damage. But the act is wrong in him only for the personal reason that he knows of its danger; it would not be wrong in any one else who did not know that. Now, for a wilful act intrinsically wrong by a servant, the master is not liable. By a parity of reason he ought not to be where the act, not wrong in itself, is only so for reasons personal to the servant, and is wilful disregard of them. The master's liability ought to be limited to that which he may anticipate and guard against, namely, the middle class of cases we have put. However this may be, it seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty; and as a direction by the master to drive furiously, or in the way called carelessly, in his park, would not be wrong in the master, it cannot be made so by a trespasser getting there, being hurt; so that quodam the master, it is *damnum absque injuria*; and if not a wrong in the master when expressly ordered, it cannot be, if done by the servant, against his orders. The defendants might, if they had thought fit, have directed their servants to move and propel trucks against other trucks without any notice or precaution—in short, to do what the plaintiff complains of; and if their servants chose to work on those terms, although it might be a wasteful way of using their engines and carriages, no one could say it was wrongful. Then the deceased cannot make it



so by coming there himself. Upon these grounds, then, whether he is considered a wrong-doer or not, we are of opinion the action cannot be maintained, and that the plea is good."

§ 19. But a master is not generally responsible for injury done to a servant by a fellow servant, if he uses reasonable care in the selection of that servant. *Tarrant v. Webb*.<sup>(m)</sup>

§ 20. *A fortiori* where the master has forbidden the act whereby the injury arises. Therefore in *Caswell v. Worth*.<sup>(n)</sup>

"Action by the plaintiff, employed in a factory, against the defendant, the occupier, for not sufficiently fencing a shaft while in motion, as required by the 7 & 8 Vict. c. 15, s. 21, whereby the plaintiff got entangled with it and was injured. Plea, admitting that the shaft was not sufficiently fenced, but alleging that the plaintiff, contrary to the express command of the defendant, and knowing that it was dangerous to meddle with the shaft, took hold of it and set it in motion, whereby, and not by reason of the negligence of the defendant, the plaintiff was injured:—Held, on demurrer, a good plea.

§ 21. The following summary of liability may then be laid down.

First, where the fellow-servant was incompetent to perform his duty.

Secondly, where the servants were not engaged on common work.

Thirdly, where the injury happens to a servant known to be inexperienced, and ignorant of the risks of the employment in which he is engaged.

The master is also liable for injuries arising from defective machinery, or from a defective system established by him, or of which he is cognisant.

§ 22. Cases occur in which the Defendant's servants cause the injury, but the master is not responsible, because the servant is not in fact employed in his master's business. The master cannot be justly said in such cases to be using his own. So in *Mitchell v. Crawseller*<sup>(o)</sup>:—

"The defendants' carman having finished the business of the day, returned to their shop in Welbeck-street with their horse and cart, and obtained the key of the stable, which was close at hand; but instead of going there at once and putting up the horse, as it was his duty to do, he, without his master's knowledge or consent, drove a fellow workman to Euston-square, and in his way back ran over and injured the plaintiff and his wife:—Held, that inasmuch as the carman was not, at

(m) 13 G. B. 797. S. C. 25. L. J. C. P. 261.

(n) 2 Jur. n. s. 116.

(o) 13 G. B. 237.

the time of the accident, engaged in the business of his masters, they were not responsible for the consequences of his unauthorised act."

So in the case of *Patten v. Rea*.<sup>(p)</sup>

"T., who was the collecting clerk of the defendant, kept a horse and gig of his own at his master's stables, free of charge, he using the same for the business of his master, as well as on his own account. T. having, whilst out with his horse and gig, to the knowledge of the defendant, and for the purpose of collecting the defendant's business debts, negligently run against, and occasioned an injury to, the horse of another person,—Held, that the defendant was liable for the injury, although he had not expressly requested T. to go with the horse and gig on his, the defendant's business.

"*Cockburn, C. J.*—I am of opinion that this rule should be discharged. I concur in the proposition stated by the learned counsel for the defendant to this extent—that it is not sufficient to make the master responsible for the negligent driving of the servant, that the servant has been guilty of negligence in driving the vehicle, unless he was driving at the time in the course of his master's employ—that is, that he was driving on such occasion with his master's authority. But I think that there was abundant evidence to satisfy that in the present case. It is true that the horse and gig in question were not the master's; but *Taylor* was the general manager of the defendant, and by a tacit arrangement between them he used the horse and gig in the service of the defendant, they being kept on the defendant's premises, and at his expense. *Taylor* must have had left to him the discretion of determining whether the business of the defendant could best be done by a horse and gig or not; and there was added to that this fact, that the defendant knew on this particular occasion that *Taylor* was so using the horse and gig. Therefore, though the horse and gig were in fact *Taylor's* they were used for his master's business and with his knowledge, and kept by the defendant, in consideration of such use, free of expense to *Taylor*. There is also, I think, no ground for disturbing the verdict for being against the evidence.

"*Williams, J.*—I am of the same opinion. I agree with Mr. *Ather-ton*, that in all cases of this kind the real question is, whether the servant was acting on the occasion as agent of the master. That is demonstrated by the course of pleading, which gives the plaintiff in such cases the option of stating the act in his declaration as the act of the defendant's servant, or by stating it, according to its legal effect, as the act of the defendant himself, which was the case of *Bruck v. Fro-*

ment<sup>(g)</sup> shows he may do. In this case I think there was ample evidence to show that *Taylor* was acting on the occasion in question as the agent of the defendant. No doubt it was necessary for the plaintiff to prove that *Taylor* was then employing the horse and gig about the defendant's business, but I think that there was sufficient evidence to establish this, and that it was so left by the learned judge to the jury; but whether it was so left or not is immaterial in this case, for no complaint of that kind is stated in the rule. I also think that it is not necessary that there should be any express request to go with the horse and gig on the defendant's business. The jury may imply it from the general nature of the employment. There is, therefore, I think, no ground for this complaint; and with respect to the other point, I also think that the verdict should not be disturbed, and that this rule cannot, therefore, be supported on either ground.

"*Willes, J.*—I am also of the same opinion. The argument of the defendant's counsel is contrary to what is laid down by *Holt, C. J.*, in *Turberville v. Stampe*,<sup>(r)</sup> where it is stated, that 'if the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit.' It is plain that *Taylor* was acting for his master in what he was doing on this occasion, and therefore the master is responsible."

§ 23. If a contractor employs another to do an act which may be done in a lawful manner, and the latter, in doing it, unnecessarily commits a public nuisance, whereby injury results to a third person, the employer is not responsible. *Peachey v. Rowland*.<sup>(s)</sup>

A. employed B. to construct a drain in a public highway. B. employed C. to fill in the earth over the brickwork, and to carry away the surplus. C., in performing his work, left the earth raised so much above the level of the road, that D., driving in the dark, was thereby upset and sustained injury:—Held, that A. was not responsible for the negligence of C.

§ 24. But the Law is otherwise where the act is itself unlawful. Therefore in *Ellis v. The Sheffield Gas Consumers Company*.<sup>(t)</sup>

"The defendants, a registered joint stock company, contracted with

(g) 6 T. R. 169.

(r) 1 Ld. Raym. 264.

(s) 13 C. B. 132.

(t) 18 Jur. 146.

A. for the laying of their main gas-pipe in the streets of Sheffield, having no special powers for that purpose. The servants of A. left a heap of earth and stones which had been thrown out of the trenches dug for receiving the pipes in one of the streets, and the plaintiff, in passing along the street, tumbled over it and was injured :—Held, that the defendants were liable to an action for the injury occasioned to the plaintiff.”

§ 25. So with respect to dangerous animals. Whether they be *feræ naturæ*, which escape, or ferocious animals of a reclaimed nature, as savage dogs, the rule is equally the same. Thus in *Jackson v. Smithson*,<sup>(u)</sup> where the action was brought for keeping a ram which was in the habit of attacking people. *Alderson, B.* said :—

“In truth, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.”<sup>(v)</sup>

§ 26. So with reference to this general principle of jurisprudence we may advantageously give instances from *Justinian*.<sup>(w)</sup>

“The Law requires that a man should not do even what he has a right to do in a manner which he ought not to adopt.”

On this subject *Justinian* teaches as follows :—

“If a man by throwing a javelin for his diversion or exercise happen to kill a slave who is passing, a distinction must be drawn. If the slave be killed by a soldier while he is exercising in a place appointed for that purpose, the soldier is not in fault : but if any other person did it, that person is legally guilty of a fault (*culpa*). And so it is if a soldier exercise himself by throwing darts in a place not set apart for that purpose.

“Also if a man lopping off branches from a tree killed your slave who is going by, he is guilty of a fault if this was done near a public road or way, and he did not call out that passers by might avoid the fall of the branch : but if he gave warning and the passer by did not take care of himself, the lopper is not liable. He is equally free from fault if he was at work away from a road or in the middle of a field, though he did not give warning, for no stranger had a right to go there.”

(u) And see *Observations*, 5 Jur. n. s. pt. 2, p. 24 & 283.

(v) This maxim is well illustrated by *Brooms*. See *Assignatus nititur jure auctoris*, p. 351.

(w) Inst. L. IV. l. 3. § 4. 5.

These two paragraphs rest on the principle that when a man does that which he has a right to do, in such a manner that no mischief can *reasonably* be apprehended therefrom, whatever mischief does in fact arise is fortuitous, so far as he is concerned and therefore he is not liable.

§ 27. So where a man has a duty to perform, care must be taken not to exceed its limits. Thus, though it is lawful to correct a child, or scholar, or an apprentice, it must be done in moderation, and the duty can afford no justification for cruelty, as the case of the infamous Mrs. *Brownrigg* taught us. So the Roman Law says, *Levis duntaxat castigatio concessa est docenti*; and, *Præceptoris nimia ævitia culpæ adnumeratur*: and see generally the *Aquilian Law*.

§ 28. A further illustration of the general rule is to be found in the maxim of *Ulpian*; *Nemo plus juris ad alium transferre potest quam ipse haberet*.

No man can transfer to another rights which he does not himself possess. For it is clear that this cannot be done without derogating from the rights of some third party, or of the State. Thus, a mortgagor cannot sell more than his Equity of redemption; nor a mortgagee more than his own mortgage term. *Quod meum est sine facto meo, vel defectu meo, amitti vel in alienum transferri non potest*.

§ 29. The Hindu Law furnishes us with an admirable illustration of this principle. Ordinarily speaking, the possessor of self-acquired property may dispose of it as he pleases: but in the case of a *father*, member of an undivided family, acquiring such property, it seems, according to the *Mitachasara*, which gives the Law in this Presidency, (though the rule is less stringent in Bengal) that he cannot alienate the immoveable, without the consent of the sons. For they have by birth an inchoate right in all the father's property; and therefore in the case of *M. Veerapa Goonden v. Mootagee*<sup>(\*)</sup> the Sudder refused to entertain a special appeal by the daughter, to whom the father had given a small portion of his self-acquired landed estate. After the father's death the son sued for the recovery, on the ground that the gift was against his will, and the Pundit, on reference being made to him, declared that

(\*) Special App. Sudder, 28th August 1858.

the son's consent was necessary.<sup>(y)</sup> And such appears to be the Law, *See Strange's Manual*, § 149. The tendency of our Courts is to unfetter the alienation of land. Accordingly *In re* the goods of *G. Royaloo Chetty* deceased,<sup>(z)</sup> the Madras Supreme Court held that the widow of an undivided Hindu brother was entitled to the administration of self-acquired estate, as against the brothers who caveated. But *quære* this decision; for the Law seems to be, that if the owner of self-acquired property does *not* dispose of it by an act *inter vivos*, it will follow the ordinary Law of inheritance.<sup>(a)</sup> If this be so, she would only have been entitled to maintenance. In *Gopeekrist Gosain v. Gungapersaud Gosain* <sup>(b)</sup>, the Privy Council laid down certain canons, but that was a Bengal case: and in *Nagatlutchmee Ummal v. Gopoo Nadaraja Chetty* <sup>(c)</sup> the right of a man, without male issue or kinsman, to dispose of the whole of his property as against his widow, after securing her maintenance, was affirmed. So if a Hindu widow were to alienate her husband's landed property, though it might not work a forfeiture of her estate, but be good against her for the period of her life, the heirs could no doubt set it aside from the moment of her death; for she could not convey a greater estate than she herself had.<sup>(d)</sup>

§ 30. There are however certain exceptions in which a party undoubtedly does give by transference a larger estate than he himself possesses, according to the English Law. The first is that of sale in market overt of chattels personal.

"A sale of goods, even by a party who has himself only the possession, and not the property, as a thief or a finder, will be valid against the rightful owner, provided it be made in market overt during the usual market hours, unless such goods were the property of the King, or unless the buyer knew that the property was not in the seller, or there was any other fraud in the transaction.

"Market overt, we may likewise observe, is defined to be a fair or market held at stated intervals in particular places, by virtue of a charter or prescription. In the city of London, however, the custom is, that every shop is, except on Sunday, market overt in regard to the goods

(y) 149. See 1. Sir Thomas Strange, 16, 25. 2 Str. 2, 11.

(z) 11th Feb. 1851.

(a) 1. Str. p. 282.

(b) 6 Moore's Ind. App. p. 53.

(c) *Ib.* p. 309.

(d) Consult the following cases—S. A. 23 of 1849. M. S. R. p. 61. S. A. 62 of 1848. S. B. p. 74. S. A. 5 of 1849. S. R. p. 115. S. A. 11 of 1852. S. R. for 1853, p. 46. S. A. 141 of 1855. S. R. for 1856, p. 14. S. A. 124 of 1856. S. B. for 1857, p. 1, 2. Moore's I. A. 331. S. A. 18 of 1842. S. A. 98 of 1856. S. R. 1857. p. 107. 6 M. I. A. p. 1, 7. Moore's I. A. p. 54.

usually and publicly sold therein ; and a sale within the city of London, in an open shop, of goods usually dealt in there, is a sale in market overt, though the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within. By Stat 1. Jur. 1. c. 21. it is enacted, that the sale of any goods wrongfully taken to any pawbroker in London, or within two miles thereof, shall not alter the property ; for this, being usually a clandestine trade, is therefore made an exception to the general rule."<sup>(e)</sup>

The Leading case is that of *Miller v. Race*.<sup>(f)</sup>

§ 31. Another is that which occasionally happens, is *Stoppage in transitu*, where though the unpaid vendor of goods has a right to stop them before they have reached his insolvent vendee, yet if the vendee has indorsed the bill of lading to a *bonâ fide* assignee, such assignee has a right to hold the goods as against the unpaid vendor. Thus in *Jenkyns v. Osborne*,<sup>(g)</sup> *Tindal, C. J.*, said :—

"The actual holder of an indorsed bill of lading, may, undoubtedly, by indorsement, transfer a greater right than he himself has. It is at variance with the general principles of Law, that a man should be allowed to being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of Law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself, which is the symbol of the property itself."

§ 32. It may be useful here to state the Roman Law.

"If, as *Savigny* remarks," writes *Mr. Phillimore*<sup>(h)</sup> "it were possible to make property and possession legally inseparable, and to consider the possessor alone as the proprietor, the theory of possession would be very simple. It happens, however, that such a state of things is not compatible with the artificial habits and exigencies of social life. The separation of possession and property is an infallible consequence of advancing refinement. Possession, the external sign of property, ceases to be an infallible guide to the real owner ; and yet as there are many cases in which it indicates the real owner, it cannot be stripped of all the ad-

(e) Broome, Leg. Max. 630.

(g) 8 Scott's N. R. 523.

(f) 1 Sm. L. C. 389.

(h) Jurisp. p. 282.

vantages which seem naturally to belong to it. Here arises a fertile cause of difficulties, which have been solved by different countries in different ways—by none in a manner so deficient in all that contributes to the cheap and easy defence of property, and to the maintenance of substantial justice, as by the legislature of England. The Roman Law conferred two rights upon the possessor, the one that of ‘*usucapio*,’ the other that of the ‘interdicts.’ ‘*Usucapio*’ was the consequence of a possession in virtue of the Civil Law, i. e., the Law of the twelve tables; ‘interdicts’ were remedies granted by the *prætor* for the provisional maintenance of every possession not proved to have been obtained by fraud or violence. *Savigny* distinguishes three kinds of possession—‘Civil possession, which may ripen into a complete title by ‘*usucapio*,’ possession, properly so called, which gives a right to the interdicts, and natural possession, which consists in a physical act, without any intention to make the thing on which the act operates our own.

“The whole effect of possession, as an active legal principle, is comprised in the two rights that I have mentioned. It should not be confounded with the ‘*usucapio*, to which the *Publiciana in rem actio* and the *fructuum perceptio*,’ must be referred. These two passages in the Digest, which, carefully considered, do not contradict but explain each other, are quite sufficient to clear up the difficulties that have been wantonly multiplied about its real nature—*Ofilius, possessionem rem facti, non juris esse ait*; and ‘*Possessio plurimum ex jure mutatur*.’<sup>(i)</sup> It is a question of fact, if considered as a cause of Law, if considered as to the effects which flow from it—‘*Omnis de possessione controversia aut eo pertinet ut quod non possidemus nobis restitatur, aut ad hoc ut retinere nobis liceat quod possidemus—restituendus possessionis ordo, aut interdicto experitur, aut per actionem. Retinenda ita que possessionis duplex via est, aut exceptio aut interdictum exceptio datur multis ex causis ei qui possidet*.’ The interdicta ‘*uti possidetis*’ and *utrubi*, were given by the *prætor*, *retinenda possessionis causâ*, the first for immoveable property, *interdicto uti possidetis de fundi vel ædium possessione contenditur*,’ the second for moveable things, ‘*utrubi vero de rerum immobilium possessione*.’ There were several ‘interdicts’ for giving back possession, the chief being the ‘*interdictum de vi*.’

§ 33. The transferee generally speaking succeeds to the rights of his assignor, whatever they may be. *Qui alterius jure utitur, eodem jure uti debet. Qui in jus damnumve alterius succedit, jure ejus uti debet. Assignatus utitur jure auctoris*: is the language of the Roman Law.

(i) Dig. xli. 2. 47.



§ 34. Thus a Mortgagor may sell his Equity of redemption,<sup>(j)</sup> which in fact is only the purchase of a right to redeem on payment of the Mortgagee's debt and interest. He cannot convey a larger estate than he has left in himself. But the assignee will stand exactly in the place of his assignor.<sup>(k)</sup> So the sheriff sells only the *right, title, and interest*, of the Execution debtor, whatever that may be. It may be nothing, or it may be the fee. So in execution of the Mofussil Court's decrees, at a sale the purchaser only buys the debtor's *interest*, and *quoad hoc* will represent the debtor and stand in his shoes. Where the subject of the sale, for instance, is land, the property of the execution debtor, leased out to tenants, the party purchasing buys the estate subject to the lease, and cannot oust the tenants in possession.

§ 35. A further illustration of the general rule is to be found in the restraint which the Law places even upon a man's own freedom of will, where it operates to the detriment of another. Wherever an agreement has been made, it cannot be departed from by one party without the consent of the other; and so, where a man has made even a representation, on the faith of which another has been induced to alter his previous circumstances, the party making the representation cannot allege a different state of circumstances from that which he originally held forth. These principles are expressed in the maxims of *Papinian*, *Nemo potest mutare constitutum suum in alterius injuriam*. *Non debet alteri per alterum iniqua conditio inferri*. *Nemo ex suo delicto meliorem suam conditionem facere potest*. No man shall take advantage of his own wrong. See the maxim illustrated by *Broome*<sup>(l)</sup> and the observations in the case of *Pickard v. Sears* in my work on Evidence § 215, 216, and Anti Topic 5th.

§ 36. Thus where a gift is once complete, the donor cannot revoke it; as the French say, "*Donner et retenir ne vaut*." Thus a voluntary conveyance is good as against the party and his representatives, though void as against subsequent purchasers, and against creditors if the party in insolvent circumstances at the time. So in *Villers v. Beaumont*<sup>(m)</sup> it was said—

"That if a man will improvidently bind himself up by a voluntary

(j) As to nature of Equity of redemption See S. A. 49 of 1858. M. S. R. 58 S. A. 52 of 1855. S. R. for 1856. p. 58.

(k) See S. A. 20 of 1854. M. S. R. of 1854, p. 88.

(l) Leg. Max. p. 209.

(m) 1 Vern. 101.

deed, and not reserve a liberty to himself by a power of revocation, a Court of Equity will not loose the fetters he hath put upon himself, but he must lie down under his own folly."<sup>(a)</sup>

Thus where a party has accepted a trust, he cannot renounce it. So of an Executor, or Administrator, proving the will or taking out letters of administration.

§ 37. Thus where A. is indebted to B. who is indebted to C., B. cannot at Law transfer the debt of A. to C.—without the consent of both A. and C. for it is an entirely new contract to which all parties must express their consent before it can have any binding obligation.<sup>(a)</sup> It is in fact an extinguishment of the original liability by a substituted contract, through which the respective parties are marshalled in entirely new relations. The Roman Law recognized this form of contract under the name of *Delegatio*. *Ulpian* says, *Delegare, est vice suâ alium dare creditorem, vel cui jusserit.*<sup>(p)</sup> But in Equity a debt can be transferred or assigned without the consent of the debtor: and the assignment will create a trust on the fund in favour of the equitable assignee, and constitute an equitable lien upon it. This doctrine is thoroughly recognized in the Mofussil Courts of India.<sup>(q)</sup> The Madras Sudder expressly says—

“The Court of Sudder Udalut remark that the Courts of this country, being quite as much Courts of Equity as Courts of Law, have always recognized the right of a party to assign over a Bond for a valuable consideration, without requiring the obligee to be of necessity a party to the same.”

§ 38. On the same ground where a trust in favour of creditors has once been communicated to them, it cannot be reversed by the settlor.

§ 39. So a tenant cannot dispute his landlord's title, though he may show that that title is at an end; for by holding under the landlord the tenant has admitted his proprietary right as between them. In an action of ejectment therefore he shall not set up the *jus tertii*, or seek to defend his possession by establish-

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(a) It would be well for parties accepting the office of Trustees to remember that they are bound by the provisions of the Trust Deed though they have never read it—that they are bound to enforce covenants contained in it and that if loss happen by reason of their omitting so to do they will be personally responsible. *Fennick v. Greenwell*, 10 Bear. 412.

(a) But see Macph: on Mortgage, p. 103.

(p) Pand. 46. l.

(q) 2. See N. W. P. R. Vol. 10 p. 474 and in S. A. No. 10 of 1850. Mad. S. R. for 1850. p. 20.

ing a defect in his landlord's title. So in *Trover*, a Bailee who has obtained lawful possession from the Bailor, shall not set up the *jus tertii* as a defence. The Bailee, however, may deliver the goods to the true owner; and such delivery will be a good defence to an action for the same goods by the Bailor. *Thorne v. Tilbury*.<sup>(r)</sup>

§ 40. On the same ground stands the force of the plea of an *account stated*. Where a party has once admitted the correctness of a balance struck against him, and there is no element of fraud, surprize, mistake, or the like, it is reasonable that he should be bound by his conduct.

§ 41. Of course where there has been gross fraud or imposition, Equity will permit the whole account to be opened up and the account taken *de novo*.<sup>(s)</sup> So in *Alfrey v. Alfrey*<sup>(t)</sup> a settlement of account, between parties in the relation of guardian and ward come to without a full investigation of accounts, was set aside after a lapse of 20 years, there being errors on the face of the accounts and fictitious entries.

§ 42. In other cases where inaccuracy or mistake is not shown to affect *all* the items, Equity will not permit the whole account to be ripped up, but permit it to stand with liberty to "*surcharge and falsify*;" under the first of which terms additional items may be proved; and under the latter, the correctness of existing items impugned. The *onus probandi* is of course on the party impugning the settled account. Long acquiescence in the correctness of an account rendered will lead to a presumption of its being admitted correct: and in some cases Equity will confine the liberty to surcharge and falsify to particular items which are stated in the Decree. *Story*<sup>(u)</sup> says:—

"Between merchants at home an account which has been presented and no objection made thereto after the lapse of several posts is treated under ordinary circumstances as being by acquiescence a stated account. Between merchants in different countries a rule founded in similar considerations prevails. If an account has

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(r) 3 Hurlston and Norman 534.

(s) Jeremy's Equity, 548.

(t) 11. Jur. 981. aff. 13. Jur. 269.

(u) Eq. Jur. 1 Vol. p. 539.

been transmitted from the one to the other and no objection is made after several opportunities of writing have occurred it is treated as an acquiescence in the correctness of the account transmitted ; and therefore it is deemed a stated account."

The rule is that the account will be presumed to be accepted as correct unless objected to within a reasonable time.

"That reasonable time" says *Story* "is to be judged of in ordinary cases, by the habits of business at home and abroad ; and the usual course is required to be followed unless there are special circumstances to vary it or to excuse a departure from it."(<sup>e</sup>)

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(<sup>e</sup>) 1 *Story* p. 590.

## TOPIC THE FOURTEENTH.

### MISTAKE.

*Non videntur qui errant consentire.*<sup>(a)</sup>

§ 1. The maxim which heads this disquisition is of the very widest application: it pervades the entire law, and is the nucleus of a cluster of maxims. It is necessary to inquire into the elements of "consent." Obviously the term implies, first, knowledge of the facts; secondly, perfect freedom in the party; thirdly, the positive act by which the consent is notified. Metaphysicians and the schoolmen may draw fine distinctions touching free will, but the language of the Roman Law, with its amazing strong sense, is clear as to what constitutes consent, even where the actor is an unwilling agent, so that the compulsion be short of what constitutes *Duress*. *Coactus volui*, it says with a sort of oxymoron; a paraphrase, as Mr. *Phillimore* points out, from Homer's *ἔκων, ἀέκοντις θυμῷ*. or as our adage has it

A man *convinced* against his *will*  
Is of the same opinion still.

where the word '*will*,' by a poetical license, is put for *wish*, since a man cannot be convinced against his will, though he may be so contrary to his wish. A man may give his consent very much against his inclination, as where he pays his adverse damages awarded against him in an action at Law. But putting aside for the present all such *Duress* as actually compels the performance of acts, it is clear that consent cannot equitably be said to have been given, unless the consenting party has a full knowledge of all the material facts which would probably influence his judgment. The Roman Law says *Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit*. But *Vani timoris justa excusatio non est.*<sup>(b)</sup>

§ 2. A moment's reflexion will show how this question of *consent* pervades the Law. In respect to Infancy, Coverture, Lunacy, Drunkenness, *Duress*; in respect to acts done under the influence

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(a) Dig. C. 17. 116.

(b) See Norton's Evidence, § 643.

of surprize and mistake ; with respect to the '*scienter*' in fraud, and the *intention* in criminal cases ;<sup>(c)</sup> with respect to the validity of contracts ; and the liability for torts ; with respect to gifts, condonation, and waiver ; it will be found to be one of the most important elements of consideration. And many maxims pithily record this fact. Consent is indeed the very foundation and essence of every contract. Thus the Roman Law<sup>(d)</sup> says, "*In omnibus rebus quæ dominium transferent, concurrat oportet, affectus ex utraque parte contrahentium : nam sive ea venditio, sive donatio, sive conductio, sive qualibet alia causa contrahendi fuit, nisi animus utrius-que consentit, perduci ad effectum in quod inchoatur, non potest.*"

§ 3. For the present we shall confine our attention to the doctrine of Mistake ; but it will be advisable before entering upon this that I would call attention to the profound observations of Aristotle<sup>(e)</sup> on this question of *voluntariness* as constituting the touchstone of a just or unjust act. The whole disquisition from the passage quoted to the end of the Vth Book should be attentively studied. It is too long for transcription here. He says—

"Now, since the abstract just and unjust are what they have been stated to be, a man acts unjustly and justly whenever he does these things voluntarily ; but when he does them involuntarily, he neither acts unjustly nor justly, except accidentally ; for they do acts which accidentally happen to be just or unjust. But an unjust act and a just act are decided by the voluntariness and involuntariness of them ; for whenever an act is voluntary it is blamed ; and at the same time it becomes an unjust act : so that there will be something unjust which is not yet an unjust act, except the condition of voluntariness be added to it. I call that voluntary, as also has been said before, which (being in his own power) a man does knowingly, and not from ignorance of the person, the instrument, or the motive ; as of the person he strikes, the instrument, and the motive of striking, and each of those particulars, not accidentally, nor by compulsion ; as if another man were to take hold of his hand, and

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(c) The recent case of *Hearne, Appellant, and Gorton, Respondent*, 5 Jur. N. S. 648 is a notable illustration of this proposition. The Great Western Railway Act enacted that "every person who shall send or cause to be sent" by the railway any goods of a dangerous quality should be liable to a penalty. The Defendant a carrier received some cases from his Principal containing oil of vitriol but stated to contain *gun stocks*, and forwarded such cases by the Railway describing the contents as already described by his constituent. The Court of Queen's Bench on special case held that the carrier was not liable and that the words "send or cause to be sent" meant "*intentionally or knowingly send or cause to be sent.*"

(d) D. 44-7-55.

(e) Ethics V. C. 8.

strike a third person; in this case he did it not voluntarily for the act was not in his own power. Again, it is possible that the person struck should be the father of the striker, and that the striker should know him to be a man, or be one of the company, and yet not know him to be his own father. Let the same distinction be applied in the case of the motive, and all the other particulars attending the whole act. Consequently, that which is done through ignorance, or if not done through ignorance, is not in a man's own power, or is done through compulsion, is involuntary. For we both do and suffer many things which naturally befall us, not one of which is either voluntary or involuntary; as, for example, growing old, and dying."

§. 4. Consent then answers to the *πρὸς ἑαυτὸν* of Aristotle, deliberate choice. But choice cannot be made upon a due deliberation, unless all the circumstances calling for deliberation are known and submitted to the judgment; and when this has not been done, consent, though given in fact, has been given under a mistake, and would not have probably been given, had all the circumstances been presented to the mind at the time of deliberation. Equity then declares that such a consent shall not be binding; but this doctrine, if left bald and general as it is above stated, would leave loopholes for slipping out of very many solemn transactions, and therefore there are grafted upon it many limitations, which are all founded upon good sense, and which together with the principal doctrine I now proceed to discuss.

§. 5. Mistakes are ordinarily divided into two classes. Mistakes of law, and mistakes of fact.

§. 6. With regard to the former, the settled rule of Law is *Ignorantia legis neminem excusat*; for the law is a subject matter which every man may know, and *ignorantia eorum quæ quis scire tenetur neminem excusat*. If a man alleges ignorance of the law, he is in point of fact seeking to excuse himself on the ground of his own laches, and *vigilantibus et non dormientibus jura subveniunt*. Whereas in regard to matters of fact, their multi-form combination may deceive the most vigilant. With regard to public Law, it is clear that society would not be safe, if the criminal could plead his ignorance of the Law as a valid justification of his act. With respect to *mala in se*, that class of crimes which sin against the law of God and man, or of Nature, as they are called,

such as murder and the like, there can be no question but that every rational person must be taken to be acquainted with them. With regard to the other class of offences, *mala prohibita*, those acts which but for some legislative enactment would be indifferent—as for instance the fiscal laws, as gathering salt on the seashore, or laws made for the encouragement of trade, as burying the dead in woollen cloths,—though they may not be necessarily known to each individual member of the state, still it is part of the social compact, that each member shall pay obedience to the laws which the legislative body may enact. That is the portion of his personal liberty which he surrenders up as the price of protection for his remaining freedom, his rights of property, person, and character. Therefore it is impossible upon any occasion arising for enforcing any of these laws, that the citizen, can be permitted to escape their efficacy by declaring his ignorance of their existence. At the same time it behoves the State to take care that each Law as it is passed, be as widely and effectively promulgated as possible.

§ 7. Whether the doctrine should prevail in respect to the transactions of private life has been the subject of much discussion among the Civilians.<sup>(f)</sup> The Roman Law appears to have drawn a distinction here, and held that ignorance of Law shall not profit those who are desirous of acquiring an advantage or right, but it shall not prejudice those who are seeking their own right. Thus the *Digest*<sup>(g)</sup> says, *juris ignorantia non excusat*. But the doctrine is well settled in England. The leading case is *Marriott v. Hampton*,<sup>(h)</sup> taken by Mr. Smith for illustration of the doctrine that money paid under a mistake of Law cannot be recovered back. The whole doctrine and the distinctions between payment under mistake of fact and mistake of law will be there found luminously discussed in the note. In *Marshall v. Collett*,<sup>(i)</sup> it is said:—

“It is a maxim of Equity, that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake. When, however, they make a mistake in Law, they cannot afterwards be heard to say that the contract shall, on that account, be set aside.”

(f) See Story on Eq : Jur. note 2. to § III. note 1 to § 139. 3 Burge's Comm. 742.

(g) L 22 : tit. 6. 6. 7.

(h) 2. Smith's Leading Cases. p. 325.

(i) Y. and Col : Exch : Cases 233.



§ 8. The ground on which this doctrine has been settled in our Law probably is that assigned by Lord *Ellenborough* in *Bilbie v. Lumley*<sup>(j)</sup> and others, that otherwise there is no saying to what extent this excuse of ignorance might be carried.

§ 9. It may be a legal fiction that every one knows the Law. In point of fact we know that the reverse is the truth; but *in fictione juris semper consistit equitas*; and here the hardship to the individual which may occasionally be wrought, yields to the general good of the community at large; and *Salus populi Suprema lex*; again, *interest reipublicæ ut sit finis litium*.

'If' says *Story*<sup>(k)</sup> 'upon the mere ground of ignorance of the Law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs. The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse, than to permit a person to reclaim his property upon the mere pretence, that at the time of parting with it, he was ignorant of the Law acting on his title. Mr. *Fonblanque* has accordingly laid it down as a general proposition, that in Courts of Equity ignorance of the Law shall not affect agreements, nor excuse from the legal consequences of particular acts. And he is fully borne out by authorities.'

§ 10. Thus when the obligee of a bond releases one of two joint obligors (not joint *and several*) under the belief that he still retains his remedy against the other, he can obtain no relief in Equity against the consequence of his act at law, which is to release *both* the obligors. So again, if a creditor gives time to his principal debtor without the knowledge and consent of his surety, this shall release the surety, notwithstanding any erroneous impression as to the Law upon the mind of the creditor. The obligation of the surety is altered; and he may justly say *non hæc in fœdera veni*.

§ 11. In considering cases wherein the alleged mistake is presented as one purely of Law, it will be material to look closely, to see whether there be not in it an ingredient of misrepresenta-

(j) 2 East. p. 469.

(k) Eq. Jur. § 111.

tion, imposition, undue influence, undue confidence, imbecility, or the like, which if shown will be a ground for relief upon another footing, that of fraud, actual, or constructive. Such for instance is an arrangement between parent and child, when the son, on coming of age, cuts off the entail to pay the father's debts; where there must be *uberrima fides* on the part of the parent, a complete knowledge on the part of the child, and an entire absence of undue influence.

§ 12. Where the point of Law is doubtful, as for instance the construction of clauses of a will,<sup>(1)</sup> and parties knowing that it is so, nevertheless agree to a compromise; that compromise shall be upheld, notwithstanding the Law shall afterwards be ascertained to be different from the supposition of it on which the compromise was effected. For here the parties can scarcely be said to have been under any mistake; they knew that the point was doubtful; and with that knowledge either they cared to inquire no farther; or thought it more for the interest of all concerned to settle the matter in the way they did, than to wait the decision. It had no influence on their consent. *Modus et conventio vincunt legem. Quisque potest renunciare juri pro se introducto.* The Law must always be on one side or the other, and no compromise would be binding, if it were at the option of either of the parties to overthrow it.<sup>(m)</sup>

§ 13. Family arrangements made on doubtful points<sup>(n)</sup> are upheld with even a stronger hand than ordinary compromises, for there is an inclination to save the honour of families and promote domestic peace.

The Leading case is that of *Stapilton v. Stapilton*<sup>(o)</sup> selected by Messrs. *Tudor* and *White* in their *Leading Cases in Equity*<sup>(p)</sup> and the remarks of Lord *Eldon* in *Gordon v. Gordon*<sup>(q)</sup> show the application and limitations of the doctrine very forcibly.

'I apprehend' he says, 'that if on the death of an individual seised in fee of an Estate, a dispute arises who is his heir, and there is room for rational doubt as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows, and all the information which

(1) *Naylor, v. Winch.* 1, S. & S. 564.

(m) See 16 Jur. 200. 12 Jur. 693, 1035.

(n) See *Hoghton v. Hoghton*, 17, Jur. 99.

(o) 1. Atk. p. 2.

(p) Vol. 2. p. 634. Sec. Ed.

(q) 3. Swans. p. 400.

he has received on the question, and at length adopt a resolution to distribute the property, under the notion that the eldest claimant is illegitimate, although it afterwards appears that he is legitimate, the Court will not disturb a family arrangement of that kind, merely because the fact is eventually found different from the supposition on which it was founded. I put the case of full and free disclosure, and where the transaction proceeds on a compromise, with reference to which no want of good faith on either side can be suggested.'

'On the question of legitimacy the verdict is decisive, and I am bound to consider the Plaintiff as the legitimate son of Colonel *Gordon*; and the question now is, whether attending to the allegata and probata in this case, these agreements are to be impeached, and to what extent, and on what terms?

'I lay out of the case the question of consideration; and I think myself justified by the authority of *Cann v. Cann* and other decision, in holding, that if a dispute arises relative to the legitimacy of children, and the members of the family, to maintain their character in the world, arrange their rights among themselves, if the matter is fully before them, their agreement will not be disturbed, because it is founded on a supposition, which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate; but then there must not only be good faith and honest intention, but full disclosure; and without full disclosure honest intention is not sufficient.'

'My view of this case, and I have not arrived at it without reluctance, is, that *James Gordon* knew that there had been some ceremony, which is called a private marriage. I cannot doubt that fact without imputing to several witnesses the most infamous perjury. I find no evidence that, at the time when the Plaintiff entered into the agreement of 1790, he was apprized of that ceremony; and I say that if *James Gordon*, knowing that fact, of which the Plaintiff was ignorant, dealt with him without disclosing it, whether the omissions of disclosure originated in design, or in honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication, the agreement cannot be sanctioned by the Court.'

'If *James Gordon* had informed the Plaintiff of the fact of the private ceremony, and afforded him the opportunity of deciding, by his own judgment, whether that ceremony constituted a marriage, and the Plaintiff had consented to impute to himself the character of illegitimacy, when by the verdict it appears that the character of legitimacy belonged to him, I think, omitting at present the question of consideration, that the Court could not have interfered with the agreement.'

§ 14. When the parties stand in relations of trust and confidence to each other, the general doctrine is qualified. Here a party shall not be prejudiced by his ignorance of Law. In the case of *Lansgloff v. Fenwick*<sup>(r)</sup> it will be observed that the Attorney *knew* the Law and did not inform his Client as he was bound to do, which alone would be a ground for relief; but the *Master of the Rolls* put the case upon the relation of the parties.

‘There’ says *Story*<sup>(s)</sup> ‘Lord *Eldon*, in a case of family agreement, seems to have thought that there might be a distinction between cases where there is a doubt raised between the parties as to their rights, and a compromise is made upon the footing of that doubt, and cases where the parties act upon a supposition of right in one of the parties, without a doubt upon it, under a mistake of Law. The former might be held obligatory, when the latter ought not to be. But his Lordship admitted that the doctrine attributed to Lord *Macclesfield* was otherwise, denying the distinction, and giving equal validity to agreements entered into upon a supposition of a right, and of a doubtful right. It may be gathered, however, from these remarks, that Lord *Eldon*’s own opinion was, that an agreement made, or act done, not upon a doubt of title, but upon ignorance of any title in the party, ought not to be obligatory upon him, though arising solely from a mistake of Law.

‘There may be a solid ground for a distinction between cases where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt or controversy, or litigation between parties as to their respective rights. In the former cases, (as has been already suggested) the party seems to labour in some sort under a mistake of fact, as well as of Law. He supposes, as a matter of fact, that he has no title, and that the other party has a title to the property. He does not intend to release or surrender his title, but the act or agreement proceeds upon the supposition that he has none. Lord *Macclesfield*, in the very case in which the language already cited, is attributed to him, is reported to have said, that if the party releasing is ignorant of his right to the estate, or if his right is concealed from him by the person to whom the release is made, there would be good reasons for setting aside the release. But (he added) the mere fact that the party making the release had the right, and was controverting with the other party, can furnish no ground to set aside the release; for, by the

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(r) 10 Ves. 405.

(s) § 129—135.

same reason, there could be no such thing as compromising a suit, nor room for any accommodation. Every release supposes the party making it to have a right.

‘The whole doctrine of the validity of compromises of doubtful rights rests on this foundation. If such compromises are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or the other, and there would be an end of compromises, if they might be overthrown upon any subsequent ascertainment of right contrary thereto. If, therefore, a compromise of a doubtful right is fairly made between parties, its validity cannot depend upon any future adjudication of that right. And where compromises of this sort are fairly entered into, whether the uncertainty rests upon a doubt of fact, or a doubt in point of Law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result. But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of a matter of fact or of Law. It has been emphatically said, that no man can doubt that the Court of Chancery will never hold parties, acting upon their rights, to be bound, unless, they act with full knowledge of all the doubts and difficulties that do arise. But, if parties will, with full knowledge, act upon them, though it turns out that one gains an advantage from a mistake in point of Law, yet if the agreement was reasonable and fair at the time, it shall be binding. And transactions are not, in the eye of a Court of Equity, to be treated as binding even as family arrangements, where the doubts existing as to the rights alleged to be compromised, are not presented to the mind of the party interested.

‘There, are cases of family compromises, where, upon principles of policy, for the honour or peace of families, the doctrine sustaining compromises has been carried farther. And it has been truly remarked, that in such family arrangements the Court of Chancery has administered an Equity, which is not applied to agreements generally. Such compromises fairly and reasonably made, to save the honour of a family, as in cases of suspected illegitimacy, to prevent family disputes, and family forfeitures, are upheld with a strong hand; and are binding, when, in cases between mere strangers, the like agreements would not be enforced. Thus it has been said, that if on the death of a person seised in fee a dispute arises, who is heir; and there is room for a rational doubt as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that

he knows, and is informed of; and at length they agree to distribute the property, under the notion that the elder claimant is illegitimate, although it turns out afterwards that he is legitimate; there, the Court will not disturb such an arrangement, merely because the fact of legitimacy is subsequently established. Yet, in such a case, the party acts under a mistake of fact. In cases of ignorance of title, upon a plain mistake of the Law, there seems little room to distinguish between family compromise and others.

‘And where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, there has been manifested a strong disinclination of Courts of Equity to sustain even family settlements. It was upon this sort of mixed ground that it was held in a recent case, that a deed executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor, was refused to be enforced. It appeared on the face of the deed, that the parties did not understand their rights, or the nature of the transaction; and that the heir surrendered an unimpeachable title without consideration. Evidence was also given of his gross ignorance, habitual intoxication, and want of professional advice. But there was no sufficient proof of fraud or undue influence; and there had been an acquiescence of five years.

‘Cases of surprise, mixed up with a mistake of Law, stand upon a ground peculiar to themselves, and independent of the general doctrine. In such cases, the agreements or acts are unadvised and improvident, and without due deliberation; and, therefore, they are held invalid, upon the common principle adopted by Courts of Equity, to protect those who are unable to protect themselves, and of whom an undue advantage is taken. Where the surprise is mutual, there is of course a still stronger ground to interfere; for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts; or have pre-supposed some facts or rights existing as the basis of their proceedings, which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem, upon general principles, invalid. *Non videntur, qui errant, consentire*, is a rule of the Civil Law; and it is founded in common sense and common justice. But in its application it is material to distinguish between error in circumstances which do not influence the contract, and error in circumstances which induce the contract.’

‘There are also cases of peculiar trust and confidence, and relation between the parties, which gave rise to a qualification of the general

doctrine. Thus, where a mortgagor had mortgaged an estate to a mortgagee who was his attorney, and in settling an account with the latter he had allowed him a poundage for having received the rents of the estate, in ignorance of the Law, that a mortgagee was not entitled to such an allowance, which was professionally known to the attorney; it was held, that the allowance should be set aside. But the Master to the Rolls, upon that occasion, put the case upon the peculiar relation between the parties, and the duty of the attorney to have made known the Law to his client, the mortgagor. He said that he did not enter into the distinction between allowances in accounts from ignorance of Law, and allowances from ignorance of fact; that he did not mean to say that ignorance of Law will generally open an account. But that the parties standing in this relation to each other, he would not hold the mortgagor, acting in ignorance of his rights, to have given a binding assent."

§ 15. The other class of mistake, is mistake of fact. The maxim is, *Ignorantia facti excusat*; as *Neratius* says, *Facti interpretatio etiam prudentissimos fallit*. The mistake or ignorance of fact must be that of some fact or facts materially affecting the contract, and going to its gist; not on any collateral point. Otherwise the party relying on his ignorance shall not have the benefit of it.

"This distinction" writes *Story*<sup>(t)</sup> "may be easily illustrated by a familiar case. A. buys an estate of B., to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, unknown at the time to both parties, that B. has no title (as if there was a nearer heir than B., who was supposed to be dead, but is, in fact, living;) in such a case Equity would relieve the purchaser, and rescind the contract. But suppose A. were to sell an estate to B., whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact it contained only nineteen acres and three-fourths of an acre, and the difference would not have varied the purchase in the view of either party; in such a case, the mistake would not be a ground to rescind the contract."

§ 16. Pure ignorance, without any attempt at imposition, is sufficient ground for relief.

"Thus" writes *Story*<sup>(u)</sup> "if one person should sell a messuage to another which was at the time, swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party; a Court of Equity would

(t) § 141.

(u) § 142.

relieve the purchaser, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence, as the basis of their contract. It constituted, therefore, the very essence and condition of the obligation of their contract. The Civil Law holds the same principle. *Domum emis, cum cam, et ego, et venditor combustam ignoraremus. Nerva, Sabinus, Cassius, nihil venisse, quamvis area maneat, pecuniamque, solutam condici posse aiunt.*"

So also if I contract to sell my horse which at the time is dead, or my ship which has foundered, though ignorant of the fact myself, I cannot enforce the contract: and if the contract have been completed, the purchaser may rescind it and have his money back. For here there is an entire failure of consideration. The thing did not exist at the time of sale; and it was a mere *nudum pactum*, which the Roman Law thus defines, "*Nudum pactum est ubi nulla causa propter conventionem, sedubi subest causa fit obligatio, et parit actionem.*" It is impossible to put a stronger case of *nudum pactum*, a more complete failure and want of consideration than that of the non-existence of the thing bargained about. The Case of *Couturier v. Hastee*.<sup>(v)</sup>

§ 17. It is not sufficient however that the fact is material. It must be one as to which the party could not by reasonable diligence have obtained information when he was put upon inquiry: for *Vigilantibus et non dormientibus jura subveniunt*. On this principle stands the doctrine of *notice*, of which hereafter.

§ 18. Again, there are cases where though the fact is material, yet if there is no legal duty or obligation cast on the one party to disclose to the other such fact, the omission to disclose affords no ground for relief *aliud est tacere; aliud celare*. For though *in foro conscientie* the party might be bound to make the fullest disclosure, the Law will not enforce the performance of merely moral obligations. *Non omne quod licet honestum est.*

*Multa non lex vetat qua tamen tacite condemnavit*, and in *Gutridge v. Outram* Sir W. P. Wood V. C. says "This Court cannot interfere with morals except where they are mixed up with the administration of the civil rights of property."

"Thus" says *Story*<sup>(w)</sup> "if A., knowing that there is a mine in the land of B., of which he knows that B. is ignorant should buy the

(v) 9. Ex. 102, 17 Jur. 1127 5 B. of H. C. 673. 2. Jur. N. S. 1245. 25. J. L. J. Ex. 253.

(w) § 147.



land without disclosing the fact to B., for a price in which the mine is not taken into consideration, B. would not be entitled to relief from the contract, because A., as the buyer, is not obliged, from the nature of the contract, to make the discovery.

"And it is essential, in order to set aside such a transaction, not only that an advantage should be taken, but it must arise from some obligation in the party to make the discovery, not an obligation in point of morals only, but of legal duty. In such a case the Court will not correct the contract, merely because a man of nice morals and honour would not have entered into it. It must fall within some definition of fraud or surprise. For the rules of Law must be so drawn, as not to affect the general transactions of mankind, or to require that all persons should in all respects be upon the same level, as to information, diligence, and means of judgment. Equity as a practical system, though it will not aid immorality, does not affect to enforce mere moral duties."

On this ground stands the doctrine of *Caveat Emptor*.

§ 19. The obligation to disclose may be affected by the relation of the parties. The very same fact which a mere stranger is not bound to disclose, a man may nevertheless be legally bound to disclose, in consequence of the relation in which he stands to the party with whom he is dealing. Wherever there exists a fiduciary relation of trust and confidence, as between trustee and *cestui que trust*, Solicitor and Client, Guardian and Ward, Parent and Child, and the like, that which was a mere moral obligation becomes *ipso facto* a legal obligation, and relief shall be given if the disclosure has not been made.

§ 20. Where equal means of information are open to both parties, and each is presumed to have exercised his own skill and judgment, though he may have judged erroneously and have in fact made a bad bargain, Equity will not relieve him: for *volenti non fit injuria*; the party may have suffered loss, but he has not sustained any legal injury; and as we have seen, the Law gives no relief in any case of *damnum absque injuriâ*. *Non decipitur qui scit se decipi*.

§ 21. A large class of cases in which Equity grants relief in cases of *mistake*, is where the instrument containing the terms of the contract does not in fact contain what the parties really intend-

ed it should. It may contain too much or too little; it may be defective through some important omission, or it may contain a material stipulation under mutual mistake. It is here that the doctrine of Specific Performance is enforced, of which we have already spoken, and of which more hereafter.

§ 22. Thus where a power has been defectively executed by mistake,<sup>(w)</sup> or where an instrument has been delivered up or cancelled under error (of fact), or where a Testator has revoked a Legacy under the impression that the Legatee was dead, Equity will give relief as though the error had not occurred.

§ 23. So also where a party has lost his case through the want of some material evidence, which was unknown to him at the trial, and which he could not by any diligence have discovered, the Courts will grant him a new trial; and this is almost the only ground on which the Court of Sudder Adawlut will listen to a petition for a review of judgment.

§ 24. A mistake of fact is also matter of excuse even in the Criminal Law. For instance, where a man intending to do a *lawful act*, does that which is unlawful. In this case, writes *Broom*.<sup>(x)</sup>

“There is not that conjunction between the deed and the will which is necessary to form a criminal act; but, in order that he may stand excused, there must be an ignorance or mistake, a fact, and not an error in point of Law: as, if a man, intending to kill a thief or house-breaker in his own house, and under circumstances which would justify him in so doing, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him and does so, this is wilful murder. For a mistake in point of Law, which every person of discretion not only may, but is bound and presumed to know, is, in criminal cases, no sort of defence.”

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<sup>(w)</sup> It is not necessary to go into the doctrine of aiding the defective execution of *Powers*, since they seldom occur in this country except in cases of adoption by widows under authority from their husbands. No doubt as Englishmen settle more frequently in India this topic will have to be handled hereafter. It frequently happens that the ceremonies required by the Hindu Law for an adoption are not performed: in these cases however the Law itself provides that the adoption shall stand good nevertheless; for in no Law more than the Hindu does the maxim, *factum valet quod non fieri debet* prevail. Still the widow must substantially follow the power, as where it is to adopt a particular individual, or of a particular family.

<sup>(x)</sup> P. 200.

## TOPIC THE FIFTEENTH.

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### INTENTION.

*In totum omnia quæ animi destinatione agenda sunt, non nisi verâ et certâ scientiâ perfici possunt.*—PAPINIAN.

As has been before observed, mutual *consent* lies at the very bottom of the law of Contracts ; and the bearing of this doctrine in cases of fraud, mistake, notice, &c., will be self-evident to the thoughtful student. So also it would be a monstrous proposition to make a *compulsory* or *unconscious* agent liable for his act ; and hence the Law recognizes certain excepted cases in which such agent is not responsible ; for instance, in *infancy* the mind is not held sufficiently formed to give that deliberate consideration and wise choice which determine men *sui juris* : so again women under *coverture* are esteemed so much under the power and controul of their husbands, that they are in many respects not considered free agents. So again acts which are the result of *duress* are generally not binding on the party ; for here the will is compelled by actual force, and an important element of consent is absent. So in cases of *drunkenness* ; especially, where there is any ingredient of fraud, the mind is so weakened by the influence of liquor that the man who has put an enemy into his mouth, literally to steal away his brains, has destroyed the distinctive mark between man and brute ; and without reason there can be no *consent*. So in respect to *Lunacy* and *Idiocy* ; here the unhappy sufferers are deprived by the hand of God of the power of due reflexion. So it is generally true, that unless there is a consenting mind, there can be no guilty act ; for *actus non facit reum nisi mens sit rea*.

§ 2. I propose to consider this question in its different bearings, very cursorily and briefly however.

§ 3. It is clear in the first place that to give room for such a consent as shall bind and render responsible for an act, there must be a freedom of agency—voluntariness. The cogent remarks

of Aristotle on the question, when a man is to be considered a voluntary agent, have already been considered. There are certain maxims also which will assist us in considering this subject. Thus it is said by *Ulpian*, *Esse est non velle, qui potest velle*. He who can say yes can say no. If therefore a man has not a free choice of saying no, he cannot say yes; and on this stands the force of duress on the capacity to contract, for *nil consensui tam contrarium est, quam vis atque metus*.

§ 4. Duress is well described by *Blackstone*.<sup>(a)</sup>

"The constraint a man is under in these circumstances, is called in Law duress, from the Latin *durities*, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; 'non,' as *Bracton* expresses it, '*suspicio cujuslibet vani et meticulos hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vita periculum, aut corporis cruciatum.*' A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb. And the indulgence shown to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the Civil Law; '*ignoscitur ei qui sanguinem suum qualiter, qualiter redemptum voluit.*'"

§ 5. Upon the consequences of want of will in the commission of crimes *Blackstone* has written so vividly, that there is little to be added to his dissertation. *Stephens* in his Commentaries thus amplifies the passage.<sup>(b)</sup>

"Having in the preceding chapter considered in general the nature of crimes and punishments, we are next led in the order of our distribution to inquire, what persons are or are not capable of committing crimes, or, which is the same thing, who are exempted from the censures of the Law upon the commission of those acts which in other persons

(a) Vol. : I. 134. See *Reg. v. McGrowther*. 1 East. P. C. 71. *Reg. v. Gordon*, ib.

(b) Comment : Vol. 4, p. 97.

would be severely punished: In the process of which inquiry we must have recourse to particular and special exceptions, for the general rule is, that no persons shall be excused from punishment for disobedience to the Laws of his country, excepting such as are expressly defined and exempted by the Laws themselves.

"All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect in will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt. The concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For though, in *foro conscientia*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet in general, and except in the rare case in which the party confesses such a design, no temporal tribunal has any means of discovering its existence, where it has not been carried out into an external action. It is besides impossible in any case to ascertain that conscience might not possibly have recovered its power in time to prevent the actual perpetration of the offence for which reasons, in all temporal jurisdictions, an overt Act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will before the man is liable to punishment. And as a vicious will without a vicious Act is no civil crime, so, on the other hand, an unwarrantable Act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be vicious will; and, secondly, an unlawful Act consequent upon such vicious will.

"Now there are three cases in which the will does not join with the Act. I. Where there is a defect of understanding. For where there is no discernment there is no choice; and where there is no choice there can be no Act of the will, which is nothing else than a determination of one's choice to do or to abstain from a particular action; he therefore that has no understanding can have no will to guide his conduct. II. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the Act or disagrees to it. III. Where the action is constrained by some outward force and violence. Here the will counteracts the deed, and is so far from concurring with, that it loaths and disagrees to what the man is obliged to perform. It will be the

business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads : as infancy, idiocy, lunacy and intoxication, which fall under the first class ; misfortune and ignorance, which may be referred to the second ; and compulsion or necessity, which may properly rank in the third.

"I. 1. Under the first division we will first consider the C. H. II. of persons capable of committing crimes. Case of infancy, or non-age ; which is a defect of the understanding. Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. What the age of discretion is, in various nations, is matter of some variety. The Civil Law has distinguished the age of minors, or those under twenty-five years old, into three stages : *infantia*, from the birth till seven years of age ; *pueritia*, from seven to fourteen ; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again sub-divided into two equal parts ; from seven to ten and a half was *etas infantie proxima* ; from ten and a half to fourteen was *etas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantie proxima*, they were not punishable for any crime. During the other half stage of childhood, approaching to *puberty* from ten and a half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief ; but with many mitigations, and not with the utmost rigour of the Law. During the last stage (of the age of *puberty* and afterwards) minors were liable to be punished, as well capitally as otherwise.

"The Law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanors ; so as to escape fine, imprisonment and the like ; and particularly in cases of omission, as not repairing a bridge or a highway, or other similar offences ; for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the Law requires. But where there is any notorious breach of the peace, a riot, battery or the like (which infants when full grown are at least as liable as others to commit,) or any perjury or cheating ; for these an infant above the age of fourteen is equally liable to suffer, as a person of the full age of twenty-one.

"With regard to capital crimes the Law is still more minute and circumspect ; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon Law, the age of twelve years was established for the age of possible discretion, when first the understanding might open. And from thence until fourteen it was *etas pubertati proxima*, in which he might or might not be guilty of a

crime according to his natural capacity or incapacity. This was the dubious stage of discretion; but, under twelve, it was held that he could not be guilty in will, neither after fourteen could be supposed innocent, of any capital crime which he in fact committed. But by the Law as it now stands, and has stood at least since that time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen, and in these cases our maxim is that '*malitia supplet aetatem.*' Under seven years of age indeed an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. Also under fourteen, though an infant shall be *præsumæ facie* adjudged to be *doli incapax*, yet if it appear to the Court and Jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus besides more ancient examples (there was an instance where a boy of eight years old was tried) in the seventeenth century at Abington for firing two barns; and it appearing that he had malice, cunning and revenge, he was found guilty and hanged accordingly. C. H. II.—of persons capable of committing crimes. Thus also in still later times a boy of ten years old was convicted on his own confession of murdering his bed-fellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the Judges that he was a proper subject of capital punishment. But in all such cases the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction. After an infant has attained fourteen, he is presumably *doli capax* and competent to commit all offences with the exceptions that have been already noticed—and at twenty-one, when infancy ceases, no privilege whatever in respect of age is recognized by Law.

"2. Another case in which the defect of understanding excuses from guilt, is that of an idiot or a lunatic, for the rule of Law as to the latter, which may be easily adapted also to the former, is that '*furiosus furore solum puniatur.*' In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities, no, not even for treason itself. Also by the Common Law if a man in his sound memory commits a capital offence, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and

caution that he ought. And, if, after he has pleaded the prisoner becomes mad, he shall not be tried; for how can he make his defence? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English Law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. And special provisions of the same tendency are now made by statute; for by 39. and 40 Geo. III. C. 94, it is enacted that if a person charged with any offence be brought up to be discharged for want of Prosecution, and appear to be insane, the Court may order a Jury to be impanelled to try the sanity, and if they find him insane, may order him to be kept in custody till the pleasure of the crown be known; that if a person indicted for any offence appear insane, the Court may, on his arraignment, order a Jury to be impanelled to try the sanity, and if they find him insane, may order the finding to be recorded, and the insane person to be kept in like manner; and that if, upon the trial for treason, murder or felony, insanity at the time of committing the offence is given in evidence, and the Jury acquit, they must be required to find specially whether insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the affirmative, the Court may order him to be kept in like manner till the Crown's pleasure be known.

"In the bloody reign, indeed, of Henry the eighth, a statute was made, which enacted that if a person being *compos mentis* should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death as if he were of perfect memory. But this savage and inhuman Law was repealed by the Statute 1 and 2 Ph. and Mc. 10. For, as is observed by Sir *Edw. Coke* 'the execution of an offender if for example, *ut pœna adpantos, metus ad omnes perveniat*;' but so it is not when a madman is executed; but should be a miserable spectacle, both against Law and of extreme inhumanity and cruelty, and can be of no example to others.

"On the other hand, however, it is not every kind or degree of insanity that will exempt a man from responsibility for his acts; and it may be laid down in general, that a partial unsoundness of mind will be no excuse. 'It is very difficult, indeed,' as Lord *Hale* observes, 'to define the invisible line that divides perfect and partial insanity, but it must be duly weighed and considered both by the Judge and Jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.' The line of distinction referred to by *Hale* has never yet been fully



traced. The Judge on a late occasion, however, gave it his opinion, that if a man who takes another's life appears to have known at the time that he was acting contrary to Law, his being under an insane delusion that he was thereby redressing some supposed grievance or producing some public benefit, will not exempt him from the guilt of murder; neither will he be exempted by being under an insane delusion as to facts; provided the supposed facts, if real, would not have justified the act; but that on the other hand he will be exempted by such delusion as last mentioned where the facts, if real, would have justified the act.

"3. Thirdly: as to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy, our Law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour. 'A drunkard,' says Sir *Edward Coke*, 'who is *voluntarius demens*, hath no privilege thereby: but what hurt or ill soever he doth, his drunkenness doth aggravate it: *namque crimen ebrietas, et incendii, et deiecit.*' It hath been observed that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence which may be necessary to make the blood move in Norway would make an Italian mad. 'A German, therefore,' says the President *Montesquieu* 'drinks through custom founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury; and drunkenness,' he adds, 'ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries.' And accordingly, in the warm climate of Greece, a Law of *Pittacus* enacted, 'that he who committed a crime, when drunk, should receive a double punishment: one for the crime itself, and the other for the ebriety which prompted him to commit it. The Roman Law, indeed, made great allowances for this voice: *per vinum delapsis capitalis pena remittitur.* But the Law of England, considering how easy, it is to counterfeit this excuse, and how weak an excuse it is (though real,) will not suffer any man thus to privilege one crime by another.

"2. Another deficiency of will is, where a man commits an unlawful act by misfortune or chance, and not by design. Here the will observes a total neutrality, and does not coöperate with the deed: which therefore wants one main ingredient of a crime. Of this when it affects the life of another we shall find more occasion to speak hereafter: at present only observing, that if any accidental mischief happens to follow from the performance of any lawful act with due caution, the

party stands excused from all guilt : but if a man, by doing any thing unlawful, (at least if it be *malum in se* and not merely *malum prohibitum*.) or any thing lawful but without due caution, produce a consequence, which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse, but he is criminally guilty of whatever consequence may follow.

"2. Ignorance or mistake is another defect of will, when a man intending to do a lawful act does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of Law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his family, this is no criminal action : but if a man thinks he has right to kill a person ex-communicated or outlawed wherever he meets him, and does so, this is willful murder. For a mistake in point of Law which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. '*Ignorantia Juris quod quisque tenetur scire, neminem excusat,*' is as well the maxim of our own Law as it was of the Roman.

"3. A third kind of defect of will is, that arising from compulsion and inevitable necessity. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves ; and which it is to be presumed his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God hath given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

"1. Of this nature, in the first place, is the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest ; as when a legislator establishes iniquity by a Law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted in *foro conscientie*, or whether the inferior in this case is not bound to obey the divine rather than the human Law, it is not our business to decide ; though the question, perhaps, among the casuists will hardly bear a doubt. But however that may be, obedience to the Laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The Sheriff who burnt *Latimer* and *Ridley* in the bigoted days of Queen *Mary* was not liable to punishment from *Elizabeth* for executing so horrid an office, being justified by the commands of that magistracy which endeavoured to restore superstition under the holy auspices of its merciless sister persecution.

"As to persons in private relations. The principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband, for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment even for capital offences; and, therefore, if a woman commit theft, burglary or other civil offences against the Laws of Society by the coercion of her husband, or even in his company, which the Law construes a coercion, she is not guilty of any crime, being considered as acting by compulsion and not of her own will: which doctrine is at least a thousand years old in this kingdom, being to be found amongst the Laws of King *Ina* the West Saxon. And it appears that among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed: '*proculdubio quod alterum libertas, alterum necessitas impelleret.*' But (besides that in our Law which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives this rule admits of an exception in the case of murder, manslaughter or robbery, these offences being of a deeper dye. In treason also (the highest crime which a member of society can, as much, be guilty of) no plea of coverture shall excuse the wife—no presumption of her husband's coercion shall extenuate her guilt,—as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the State, has no right to that obedience from a wife, which he himself, as a subject, has forgotten to pay. In misdemeanours, also, we may remark another exception; that a wife may be indicted with her husband for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the Law presumes to be generally conducted by the intrigues of the female sex; and in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any *feme sole*.

"2. Another species of compulsion or necessity is what our Law calls *duress per minas*; or threats and menaces which induce a fear of present death, or other grievous bodily harm; which takes away the guilt of many crimes and misdemeanours—at least before the human tribunal: and, therefore, in time of war or rebellion, a man may be justified in

doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. *Duress per minas* is not however an excuse for every species of crime : for though a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant ; for there the Law of nature and self-defence, its primary canon, have made him his own protector. It is to be observed, too, that the compulsion which takes away guilt, must be the fear of no less than present death or grievous bodily harm ; for the mere apprehension of having houses burnt or goods spoiled is not sufficient. It must also be a just and well-grounded fear—" *qui cadere possit in virum constantem, non timidum et meticulosum,*" as *Bracton* expresses it in the words of the Civil Law.

" 3. There is a third species of necessity which may be distinguished from the actual compulsion of external force or fear ; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which, without such obligation, would be criminal ; and that is, when a man has his choice of two evils set before him, and being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active ; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man by the commandment of the Law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority. It is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public, and therefore excuse the felony which the killing would otherwise amount to.

" 4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general Law ; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities ? And this both *Grotius* and *Puffendorf*, together with many other of the foreign Jurists, hold in the affirmative ; maintaining, by many ingenious, humane and plausible reasons, that in such cases the community of goods, by a kind of tacit concession of society, is revived ; and some even of our own lawyers have held the same, though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians ; at least it is now antiquated, the Law

of England admitting no such excuse at present. And this its doctrine is agreeable, not only to the sentiments of many of the wisest of the antients, particularly *Cicero*, who holds that '*Sum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*,' but also to the Jewish Law as certified by King *Solomon* himself. 'If a thief steal to satisfy his soul when he is hungry, he shall restore sevenfold, and shall give all the substance of his house:' which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason; for men's properties would be under a strange insecurity if liable to be invaded according to the wants of others, of which wants no one can possibly be an adequate judge but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse; for by our Laws such sufficient provision is made for the poor, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by Baron *Puffendorf*, and whereon he builds his strongest arguments; which, however they may hold elsewhere, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our Laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous, especially when we consider that the Sovereign, on the representation of his ministers of justice, hath a power to soften the Law, and to extend mercy in cases of peculiar hardship; an advantage which is wanted in many States, particularly those which are democratical; and these have in its stead introduced and adopted, in the body of the Law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing Law."<sup>(c)</sup>

§ 6. Intention being thus an essential element in crime, it becomes an important question to know how we are to prove its existence. Man has not a window in his breast; we cannot dive into his thoughts; and therefore we can only divine his intentions by his acts. *Acta exteriora interiora secreta indicant*; and whatever a man's intentions may be, if they do not exhibit themselves in his acts, he is not criminally responsible.<sup>(d)</sup> There must be some

(c) See Mayne's Criminal Law Book I. Ch. 1. Norton on Evidence. 'Drunkenness,' p. 331. Insanity, p. 172. Archbald Cr. Pl. & Ev. p. 12.

(d) *Rex v. Scofield. Broom, Com. 875.*

"overt act;" act and intention must coalesce. But on the other hand, from the same impossibility of positively ascertaining the intentions of mankind, it is a fair presumption that a man intends his acts to be followed by their ordinary and natural consequences; and hence from the act the Law infers the intention.

"A wrong intent, then, or something tantamount thereto," writes *Broome*,<sup>(e)</sup> being ordinarily an essential element in crime, how, it may be asked, is this intention to be proved? Now, a Jury is justified in inferring the intent from overt acts, because every man, as well in criminal, as in civil, procedure, must be taken to have intended that which is the necessary or natural consequence of his own Act. It is an universal principle, that, 'when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of Law resulting from the doing the act.' Thus, where the Defendant was indicted for a nuisance, and it was on his behalf contended, that, to render him liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act, *Littledale*, I., answered. 'If it be the probable consequence of his act, he is answerable, as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it.'"

§ 7. Further illustrative of the principle of Law that responsibility depends upon voluntary free agency are to be found sundry maxims, which it must suffice to glance at; such is that of *Paulus*, *Culpâ carent qui factum non prohibere possunt*. Hence the inability of the party to prevent a crime which he knows is meditated, is ground of personal exemption; but in our Law no allowance is made on the score of natural affection; and a son who was aware that his father was about to commit treason, and did not communicate the fact to the authorities, would be guilty of *misprision* of treason. Silently to behold the commission of felony, without endeavouring to apprehend the offender, is *misprision* of felony. If to knowledge be added assent, the party will become an accessory.

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(e) Comment. 873.

## TOPIC THE SIXTEENTH.

### ACCIDENT.

§ 1. By Accident is meant not only what is technically called "*vis major*," such as inevitable calamity, the act of Providence, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are *not* the result of any negligence or misconduct of the party.

§ 2. Thus in the case of lost bonds,<sup>(a)</sup> promissory notes, and the like obligations, Equity enforces payment, on the party undertaking not to sue on the instrument if discovered, and giving such guarantee or indemnity as the Court may direct.

§ 3. So where a party, from long possession, or exercise of right over property, may be presumed to have a legal title to it, though he has not the legal evidence of his title, or is unable to produce it.

§ 4. So where executors pay debts and legacies upon the entire confidence that the assets are sufficient for all, and it should turn out that there is a deficiency: if they have acted with good faith and due caution, they will be entitled to relief. So *Story*<sup>(b)</sup> writes:—

"If an Executor should receive money, supposed to be due from a debtor to the estate; and it should turn out that the debt had been previously paid; and before the discovery he had paid away the money to creditors of the estate; in such a case, the supposed debtor may recover back the money in Equity from the Executor; and the latter may in the same manner recover it back from the creditors to whom he paid it. In like manner, if an Executor should recover a Judgment, and receive the amount, and apply it in discharge of debts, and then the Judgment should be reversed, he is compellable to refund the money, and may recover it back from the creditors."

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(a) Courts of Law at a subsequent period would give relief on a lost Bond, but the remedy is not even now so complete as in Equity. *Read v. Brookman*, 3 Term Report p. 151, decided that a deed may be pleaded *without profert*, when alleged to be lost by time or accident. The general rule of Law required that *profert* should be offered of every deed pleaded, which the party '*profert in curiam*;' and of which the antagonist prayed '*oyer*' or inspection. In this case *Chambre* argued that *lex non cogitad impossibilia*. See this case remarked on Lord Eldon in *Ex-parte Greenway* 6 Ves. 812.

(b) Eq. Jur. § 91.

§ 5. So also in the case of an unpaid legatee, those paid by full shall refund proportionately.

§ 6. So where there has been an accidentally defective execution of a trust, or where trusts are prevented being executed in a casualty.

"Thus" writes *Story*<sup>(c)</sup> "if a testator should by his will, devise certain estates to A. with directions that A. should at his death distribute the same among his children and relations, as he should choose, and A. should die without making such distribution, a Court of Equity would interfere, and make a suitable distribution; because it is not given to the devisee as a mere power, but as a trust and duty, which he ought to fulfil; and his omission so to do by accident or design, ought not to disappoint the objects of the bounty. It would be very different, if the case were of a mere power, and not a power coupled with a trust."

§ 7. But there are many cases where no relief can be given. Thus, in matters of positive contract and obligation, it is no excuse nor any ground for equitable interference, that the party has been in no default, or that he has been prevented by accident from receiving the full benefit on his side. Thus, says *Story*<sup>(d)</sup>—

"And this leads us, naturally, to the consideration of those cases of accident, in which no relief will be granted by Courts of Equity. In the first place, in matters of positive contract and obligation created by the party, (for it is different in obligations or duties created by Law) it is no ground for the interference of Equity, that the party has been prevented from fulfilling them by accident; or that he has been in no default; or that he has been prevented by accident from deriving the full benefit of the contract on his own side. Thus if a lessee on a demise covenants to keep the demised estate in repair, he will be bound in Equity, as well as in Law, to do so, notwithstanding any inevitable accident or necessity, by which the premises are destroyed or injured; as if they are burnt by lightning, or destroyed by public enemies, or by any other accident, or by overwhelming force. The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume an intentional general liability, where he has made no exception.

"And the same rule applies in like cases, where there is an express covenant, (without any proper exceptions) to pay rent during the term.

(c) Eq. Jur. § 98.

(d) Eq. Jur. § 101, 1.



It must be paid, notwithstanding the premises are accidentally burnt down during the term. And this is equally true as to the rent, although the tenant has covenanted to repair, except in cases of casualties by fire, and the premises are burnt down by such casualty; for, *expressio unius est exclusio alterius*. In all cases of this sort of accidental loss by fire, the rule prevails, *Res perit domino*; and therefore, the tenant and landlord suffer according to their proportions of interest in the property burnt; the tenant during the term, and the landlord for the residue."

"Equity<sup>(e)</sup> will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault; for in such a case the party has no claim to come into a Court of Justice, to ask to be saved from his own culpable misconduct. And, on this account, in general, a party coming into a Court of Equity is bound to show, that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents.

"In the next place,<sup>(f)</sup> Courts of Equity will not interfere upon the ground of accident, where the party has not a clear vested right; but his claim rests in mere expectancy, and is a matter, not of trust, but of volition. Thus, if a testator, intending to make a will in favour of particular persons, is prevented from doing so by accident, Equity cannot grant relief; for it is not in the power of the Court to relieve against accidents, which prevent voluntary dispositions of estates; and a legatee or devisee can take only by the bounty of the testator, and has no independent right, until there is a title consummated by Law. The same principle applies to a mere power, such as a power of appointment, uncoupled with any trust; if it is unexecuted by accident, or otherwise, a Court of Equity will not interfere and execute it, as the party could or might have done. But if there were a trust, it would, as we have seen, be otherwise."

§ 8. Accident, though inevitable, is no defence for the non-performance of a contract which it was possible to perform at the time of entering into a contract. Where a man enters into a contract to perform an impossibility the contract is simply void: But otherwise, no accident, however inevitable, or other contingency, although it was not foreseen by, or within the contract of the party affords any defence to an action for the breach of the contract. It was open to the party expressly to have provided against contingencies, and to exempt himself from responsi-

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(e) Story, Eq. Jur. 105.

(f) Eq. Jur. 105 a.

bility in certain events. Thus, marine insurances, charter-parties, bills of lading, &c. usually provide for non-liability in event of certain accidents, such as perils of the seas, the act of God, or the king's enemies, and the like. But otherwise the occurrence of such an accident will not excuse the non-performance of the contract. Thus if a man covenant to deliver goods at London, the loss of the boat by tempest will not excuse him. So if a Lessee covenant to repair, or to pay rent, he is not discharged by the destruction of the premises by lightning, fire, wind, or flood. So when a man covenanted to pay a certain proportion of the value of the coals raised from a pit, unless prevented by unavoidable accident, it was held that he was bound to work or pay the proportion, when the accident did not render the working a physical impossibility, although the cost of such working was greater than the value of the coal raised.

§ 9. It may not be out of place here to state cursorily the precepts of the Civil Law respecting damages the result of accident. The work of *Domat* may be advantageously consulted here: and the passages about to be quoted afford an excellent example of the strong sense and extreme acuteness with which the Latin Jurisprudents distinguished between the different causes, amounts, and extents of liability.

§ 10. Where the damage is the result of an innocent act *Domat* writes:—

“If there happens any damage by an unforeseen consequence of an innocent act, when no blame can be charged on the author of the act, he will not be answerable for such a consequence. For this event will have some other cause joined with that of the act, whether it be the imprudence of the person who has suffered the damage, or some accident. And it is either to this imprudence, or to this accident, that the damage ought to be imputed. Thus, for example, if any one goes across a public mall whilst people are playing in it, and the ball, being already struck, chances to hurt him; the innocent act of the person who struck the ball does not make him answerable for an event, which ought to be imputed either to the imprudence of the person to whom it has happened, if he could not be ignorant that that was a public mall, or to a mere accident, if that act was altogether unknown to him, and if nothing of imprudence could be imputed to him who struck the ball.”

§ 11. Where the damage is the result of an Accident which was preceded by some act that gave occasion to it.

“When any loss or damage happens from an accident, and when the act of some person, which is mixed with the accident, has been either the cause or occasion of the said event; it is by the nature of the act, and by the connection which it may have with what has happened, that we ought to judge whether the said person should be made to answer for the damage, or should be acquitted of it. Thus, in the cases of the first and fourth articles of this section, the event is imputed to him whose act has occasioned some damage; thus, on the contrary, in the cases of the third and seventh articles, the event is not imputed. Thus, for another case different from those of all these articles, if a person who takes upon him the care of the affairs of another without his knowledge, or a tutor, guardian, or other administrator, having received a sum of money for the use and benefit of the person whose affairs are under his management, lays up the said money by him for some time, without putting it to any use, when he might have paid off with it debts which his administration obliged him to acquit, whether to other creditors or to himself, if he was likewise a creditor; and if it happens that the said money is carried off by robbers, or perishes through fire, or that the value of the coin be diminished; that loss might fall upon the said person, if he had no reason to keep the money by him, and if it was his fault that he did not employ it, either to pay what was owing to himself, or to discharge other creditors, or to apply it to other uses; or the loss may fall upon the persons for whose account the money was received, if any just cause had induced the receiver to defer the employing of it. And this will depend on the nature of the conduct which the said person shall have observed, and on the other circumstances, which may either oblige him to make good the loss, or discharge him of it.”

§ 12. Where the accident was preceded by a fault.

“If the accident is a consequence of an unlawful act, and if there follows from it any damage, he whose act has given occasion to it will be liable to make good the damage; and that with much more reason than if the accident were only a consequence of some imprudence, as in the cases of the fourth article. Thus, for example, if a creditor takes, without the authority of justice, a pledge from his debtor against his consent, and if the said pledge chanches to perish by some accident in the hands of that creditor, he shall be accountable for it.”

§ 13. Engagements may be the result of Accident.

"We shall see in this title a kind of involuntary engagements, and which have no other cause besides mere accidents. By accidents are meant the events which do not depend on the will of those to whom they happen, whether the said events be the cause of gain or of loss. Thus, to find a treasure and to lose one's purse are accidents of these two kinds.

"Accidents happen either by the act of man, such as a robbery, a fire; or by a pure effect of the providence of God and of the ordinary course of nature, such as thunder, lightning, a shipwreck, an inundation; or by an effect proceeding partly from a natural cause, and partly from the act of man, such as a fire which happens by stacking up hay before it is well dried.

"We must likewise distinguish, in the accidents in which the act of man has a share, two sorts of acts. One is of those in which there is some fault; as if one, playing at mall in a highway, wounds a person that is going by. And the other is of those which are innocent, and where nothing can be imputed to the author of the act; as if the same case had happened in a public mall, through the fault of him who crossing it rashly was wounded.

"When the accident is a consequence of some fault which has given occasion to it, he whose act has been the cause or occasion of the accident ought to repair the damage caused by it. In which case, his engagement is more the effect of his fault than of the accident; and this sort of engagements is a part of the subject-matter of the foregoing title. But in the present title we shall speak only of such engagements as have no other cause besides that of a mere accident. The accidents which are not attended with any fault may have divers consequences with respect to engagements. Sometimes they dissolve the engagements. Thus, a seller is discharged from the obligation to deliver the thing sold, if it perishes without his fault, whilst he is not in delay to deliver it; and the buyer will nevertheless be liable to pay the price. Sometimes the accident lessens the engagement, as when a farmer suffers a considerable loss by an unusual barrenness, by a shower of hail, by a frost, or other accidents. At other times the accident makes no change in the engagement, although it causes loss. Thus, if it happens that he who had borrowed money loses it by a robbery, by fire, or other accident, he is nevertheless obliged to repay it, as much as if he had employed it usefully. And, in fine, it happens by another effect of accidents, that they form engagements between one person and another.

## TOPIC THE SEVENTEENTH.

### FRAUD.

*Ex dolo malo non oritur actio.*

§ 1. Fraud *vitiates* every contract *ab initio*. Though if a party subsequently ratify the agreement, he cannot again set it aside on the original ground of fraud.

§ 2. Hitherto we have been confining our attention to the cases of mistake through ignorance; where a party has been led into error through positive misrepresentation or fraud of any sort, there is a distinct substantive ground for affording him relief; and on the other hand of guarding against the wrong-doer taking advantage of his own wrong. If a party, acting in mere ignorance, cannot be said to give his consent, *a fortiori* he cannot be, where he is the victim of imposition. This leads us to the wide subject of Fraud.

§ 3. Courts are cautious in not laying down any definite rules respecting the relief they will give in respect to matters of fraud; for as Lord *Hardwicke* observed in his letters to Lord *Kaimes*;

"Fraud is infinite, and were a Court of Equity once to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive."

§ 4. Fraud can never give ground for, or any right of, an action. *Ex dolo malo non oritur actio*. On which point the great case of *Collins v. Blantern*<sup>(a)</sup> is the Leading case. The term here used by the Roman Law is *dolus malus*. So that *dolus* does not answer to our term *deceit*, but rather to artifice; and there might be a *dolus bonus* as well as a *dolus malus*, a sort of *pia fraus*; and *dolus bonus* may be justifiable, as stratagems of war, ambuscades and the like, between belligerents. But *dolus malus* is thus defined by *Labo*; *Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum, adhibitum.*

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(a) 1 Sm. L. C. p. 263.

§ 5. But Equity, as administered in our Courts, extends to still wider limits, for it includes not only sins of commission, but of omission. Thus it relieves not only against positive acts, but against concealments, and omissions, which must be a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue advantage is taken of another.

§ 6. In the Leading case of *Chesterfield v. Jansen*<sup>(b)</sup> Lord *Hardwicke* thus described the different kinds of fraud:—

“First, Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. Secondly, it may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the Common Law has taken notice. Thirdly, Fraud, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of Law, which is, that it must be proved, not presumed. But it is wisely established in the Court of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance. Fourthly, Fraud, which may be collected and inferred, in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. Fifthly, Fraud in what are called catching bargains with heirs, reversioners, or expectants in the life of the parents, which indeed seems to fall under one or more of the preceding heads.”

§ 7. Fraud may be divided on various principles. One most obvious division is that of *actual* and *constructive* Fraud; another is that less obvious but well recognized one, of *Legal* and *Moral* Fraud. This distinction has already been touched on in these pages, with reference to those cases where there may exist a moral, though not a legal obligation, to disclose information. So again where a vendor simply puffs or exaggerates the value and excellence of his wares: the rule is, “*Ea quæ commendandi causâ in venditionibus dicuntur, si palam appareant, venditorem non obligant.*” Here the rule *Caveat Emptor* applies. It would be otherwise if the

(b) 2 Vee. Senr. p. 155. s. c. 1 Tud. & White L. C. 428.

means of knowledge are not open. Then the Roman Law said, *At si dixerit hominem literatum vel artificem, prestare debet, nam hoc ipso pluries vendidit.*

The misrepresentation enhances the price.

§ 8. Mr. *Broome* in his Commentaries<sup>(c)</sup> well explains this distinction between legal and moral fraud.

"I would however, first observe that a distinction undeniably exists between moral and legal fraud; that there are many kinds of moral fraud which clearly could not be made available, either as ground of action or by way of defence before a Court of law. Thus a vendor is entitled to sell for the best price he can get, and is not in any way liable at Law for a simple commendation of his own goods, however worthless they may be, provided he has not made any false statement as to their quality or condition, nor asserted any thing respecting them which may amount to a warranty in legal contemplation. It has even been held, that the vendor of a chattel, in which there is a patent defect which greatly diminishes its value, will not incur liability by silence with regard to it; and if A. treats with B. for the purchase of an estate knowing that there is a valuable mine under it, and B. makes no inquiry, there is authority to show that A. is not bound either at Law or in Equity to give information as to the existence of the mine. Now, in any of the cases here suggested, although the Moralist might possibly condemn, our Law would decline to give redress. *Non omne quod licet honestum est.*

"As on the one hand there may thus be an intention to mislead or even an attempt to induce a person unknowingly to sacrifice his own interest, without fraud in Law; so, on the other hand, legal fraud may exist, without any serious amount of moral turpitude. 'The cases,' says *Parke, B.*, in *Murry v. Mann* 'show a distinction between legal and moral fraud. For instance, where a person purports to accept a bill of exchange by procuration, when in fact he has no such authority, that has been held a legal fraud, rendering the party liable to an action of deceit,' although the Jury negatived the existence of fraud."

§ 9. Whether an action can be sustained on the ground of mere legal fraud, when unaccompanied by any degree of moral fraud, has been much discussed in the Courts, and opinions have differed. In *Cornfoot v. Fowke*,<sup>(d)</sup> Lord *Abinger* was of opinion that

(c) 342 Broom. Com.

(d) 6 M. & W. 385.

legal fraud alone was sufficient: but the balance of authority is certainly the other way. In *Thorn v. Bigland*,<sup>(e)</sup> Parke, B. says—

“It is settled Law that, *independently of duty*, no action will lie for a misrepresentation, unless the party making it knows it to be untrue and makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position, to his damage. This appears from the cases of *Evans v. Collins* and *Ormrod v. Huth*, which have perfectly settled the Law on that point. So in *Wilde v. Gibson*, it was contended, that an action of deceit might be maintained, without proof of actual fraud; but Lord Campbell answered, From that position I entirely dissent. If you mean by fraud, an intention to injure the party to whom the representation is made, or to benefit the party who makes the representation, there may be an action of deceit without fraud; but there must be falsehood: there must be an assertion of that which the party making it knows to be untrue; the scienter must either be expressly alleged, or there must be an allegation that is tantamount to the scienter of the fraudulent representation, and this allegation must be proved at the trial; and his Lordship adds, If that falsehood is stated, without any view of benefiting the person who states the falsehood, or of injuring the person to whom the falsehood is stated, in one sense of the word you may say it is not fraudulent but it is a breach of a moral obligation, it is telling a lie; and if a lie is told, whereby a third person is prejudiced, although there may be no profit to the person who tells it, and although no injury was intended to the party to whom it is told, but a benefit to a third person, it is clearly a breach of moral obligation, and is a fraud which will support an action of deceit.”

In *Taylor v. Ashton*,<sup>(f)</sup> Parke, B. expressly says:

“An action for deceit will not lie without proof of *moral fraud*” and his judgment discusses shortly. “The action was brought against the defendants, who were the directors of the Manchester department of the Commercial Bank of England, for false and fraudulent representations alleged to have been made by them, in a report which was published, stating in substance the flourishing state of the bank. It is alleged that this report was calculated to induced persons to buy shares, and that it was published by the defendants fraudulently, with the view to induce persons to buy shares; that the plaintiff had bought shares upon the faith of it, and that the statements contained in that report were untrue, and that the defendants knew them to be untrue at the time of the publication. That is the substance of the first count of the

(e) 8 Ex. 731.

(f) XI. M. & W. 401.



declaration, on which the question entirely arises. It is said the learned Judge misdirected the jury in several respects. The principal objection was, that he told them it was necessary they should be satisfied that a fraud—that is, a *moral fraud*—had been committed by the defendants. It was contended by Mr. Knowles, that it was not necessary moral fraud should be committed, in order to render these persons liable; for that if they made statements for their own benefit, which were calculated to induce another to take a particular step, and if he did take that step to his prejudice in consequence of such statements, and if such statements were false, the defendants were responsible, though they had not been guilty of any moral fraud. Indeed, he said the finding of the jury on this issue would warrant the position he took:—because the jury found the defendants not guilty, but at the same time said they begged to express their opinion that the defendants had been guilty of *gross negligence*; and it is insisted that even that, accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent; because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be *fraudulently made*. That is the doctrine laid down in *Pasley v. Freeman*, where, for the first time, the cases on this subject were considered. In that case Mr. Justice Gross differed from the rest of the Court, and thought the Law gave no remedy for fraud, unless there was a contract between the parties. The Court, however, held, that if a person told that which was untrue, and told it for a fraudulent purpose, and with the intention to induce another to do an act, and that act was done to the prejudice of the plaintiff, then an action for fraud would lie. That case was followed by *Haycraft v. Creasy*, and a great variety of other cases, and it must now be considered as established Law. But then it was said, that, in order to constitute that fraud, it was not necessary to show that the defendants *knew* the fact they stated to be untrue; that it was enough that the fact *was* untrue, if they communicated that fact for a deceitful purpose; and to that proposition the Court is prepared to assent. It is not necessary to show that the defendants knew the fact to be untrue; if they stated a fact which was true for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that 'case it would be both a legal and moral fraud.' In *Attwood v. Small*,<sup>(g)</sup> 'If it has been said in a case already cited, two parties enter into a contract, and if one of them, for the purpose of inducing the other

(g) 6 A. and E. 232.

to contract with him, shall state that which is not true in point of fact, which he knew at the time he stated it not to be true, and if, upon that statement of what is not true, and what is known by the party making it to be false, this contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at Law an action open to the party entering into such contract, an action of damages grounded upon the deceit; and there will be a relief in Equity to the same party to escape from the contract which he has so been inveigled into making by the false representation of the other contracting party."

§ 10. From these cases it appears that though there may be moral fraud which shall not render its author legally liable, there can be no legal fraud *of which moral fraud is not an element*. If a man state as true that which he *knows* to be untrue, he is guilty of a direct, wilful, misrepresentation; but a case may arise in which the party may state that to be true of which he had no positive knowledge. Here he may either believe his representation to be *true*, or to be *untrue*. In the latter case, that is, if he did not believe it to be true, and put it forward nevertheless for a fraudulent purpose, the fact of his want of *knowledge* as to the untruth of his statement, would not protect him. He would be guilty of fraud legal and moral. But suppose the party puts forward the statement not indeed knowing, but believing it to be true? Here it seems, the party is not responsible. In *Attwood v. Small*,<sup>(A)</sup> Lord Brougham has laid down the most practical and useful rule in these cases—

"Three circumstances" he says "must combine; it must appear, first, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and thirdly, and chiefly that it was the false representation which gave rise to the contracting of the other party—there must be *dolus dans locum contractui*, i. e. not merely a fraudulent attempt at overreaching, but an attempt so far successful as to have operated as an inducement to the other party to contract."

§ 11. If the party be under any *duty* or *obligation* to state the truth correctly, an action will lie for causing loss to the

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(A) The history of this contest between the Courts of Exchequer and Queen's Bench will be found in the Note to the (4 Ed.) 2 Sm. L. C. Case of *Pasley v. Freeman*, p. 81, and see Note to Smith's *Law of Contracts*, p. 137.

Plaintiff by an incorrect statement, independent of moral fraud. Such duty may arise from the fiduciary relation of the parties; or in contract, where the representation expressly or impliedly forms part of the agreement. In treating this subject I have purposely refrained from embarrassing the text with any reference to the distinctions between forms of action, as it bears on the point. I mean as to declaring either upon the contract; or waiving the contract, and bringing an action for the tort in case in the nature of an action for the deceit; in which case, to use the Pleadings jargon, the '*scienter*' must be laid and proved, for it is the jit of the action. In this country the Plaint is sufficient if it states the facts.

§ 12. It is advisable to obtain a clear conception of the difference between a mere *representation* and a *warranty* before proceeding further.

"Where there is a written contract, the warranty forms a part of the contract, but the representation is collateral to the contract, and may be made verbally, though the contract be in writing; and if it be of a fact, without which the other party would not have entered into the contract at all, or at least on the same terms, it is equally effectual, if untrue, to avoid the contract, or to give an action for damages on the ground of fraud. For instance, in the case of an action by the purchaser of a public-house, who has been induced to buy or to give a greater price for the good will of the house, by a representation of the extent of its business, if that representation turns out to be false, it has never been doubted that the contract is void, and that the buyer may recover back his money in an action for money had and received to his use.

"It is further material to observe, with reference to the distinction between an action upon the case for a false representation and one upon a warranty, that, to support the former, three circumstances must combine: first, it must appear that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and, thirdly, that it was the false representation which gave rise to the contracting of the other party. In the latter case above specified, viz., that of an action for breach of warranty, it is not necessary that all those three circumstances should concur, in order to ground an action for damages at Law or a claim for relief in a Court of Equity; for where a warranty is given, by which the party undertakes that the article sold shall, in point of fact, be such as it is described, no question can be raised upon the *scienter*, upon the fraud or wilful misrepresentation."

"A warranty," says Lord *Mansfield* or *Stewart v. Wilkins*<sup>(i)</sup> "extends to *all* faults, known and unknown to the seller." The Leading case of *Chandler v. Lopez*<sup>(j)</sup> offers a good illustration. There the Defendant sold the plaintiff a stone which he affirmed to be a Bezoar stone, but which proved not to be so. No action was held to lie, because it was not averred and proved either *that he knew it was not a Bezoar stone, or that he warranted it to be a Bezoar stone*. Had he warranted it, his knowledge would have been immaterial—but there being no warranty, his representation should have been shown to have been untrue within his own knowledge. At the present day this action would probably have had a different termination; for every affirmation at the time of the sale of personal chattels, is a warranty, if it was so intended; and here the Defendant was a jeweller. Or if an action were brought in tort, the fact that the Defendant was a jeweller would be almost irresistible evidence of the *scienter*.

§ 13. It is essential to bear in mind the distinction between a representation and a warranty. An *express* warranty is a stipulation inserted in the writing on its face, on the literal truth or fulfilment of which the validity of the entire contract depends. Every verbal affirmation at the time of the sale of a personal chattel is also a warranty, as above stated, and there are cases of *implied* warranties, though nothing is expressly said, as in marine policies of assurance, there is an implied warranty of seaworthiness at the time of the vessel starting (except in time-policies) *Gibson v. Small*.<sup>(k)</sup> *Fawcus v. Sarsfield*.<sup>(l)</sup> Now the distinction is important, because a representation is held to be satisfied if it is *substantially* fulfilled; but a warranty must be *literally* complied with. So where a broker effected an insurance on a ship which he represented "to mount twelve guns and carry twenty men."<sup>(m)</sup> This statement was held to be substantially answered by her having nine carriage guns and sixteen men, besides six swivels and nine boys, which was in fact a stronger armament than that represented. A representation may be equitably and substantially answered, says Lord *Mansfield*, 'but a warranty must be strictly complied with.'<sup>(n)</sup> Had

(i) 4. Dougl. 20.

(j) 2 Croke 2. 8. C. 2. Sm. L. C. 160.

(k) 17 Jur. 1181.

(l) 20 Jur. 665. ib. pt. 2, p. 405.

(m) *Pawson v. Watson*, Cowp. 787.

(n) *De Hahn v. Hartly*, T. B. 345.  
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this very representation been incorporated into the terms of the policy, it would have been a warranty, and the policy would have been void on account of the variance between the actual armament and its description.

§ 14. Another important distinction between a representation and a warranty, is, that in the case of a warranty all questions of the materiality or immateriality of the fact are excluded. The simple question, the sole inquiry is :

"Is it, or is it not, warranted that the fact is, or shall be so and so? If it be, then, however wholly unimportant the fact may be to the risk, however little its existence or non-existence may have influenced the judgment of the underwriter as to the rate of premium, it matters not; it must be absolutely true, or literally performed, otherwise the policy will be wholly void: the falsehood of a representation, on the other hand, will produce no effect on the policy unless the fact misrepresented be material."

§ 15. What concealment will vitiate a policy is laid down in the Leading case of *Carter v. Boehm*<sup>(o)</sup> selected by *Smith*.<sup>(p)</sup> There Lord *Mansfield* luminously laid down the general law. Insurance is a contract upon speculation.

"The special facts, upon which the contingent chance is to be computed, be most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

"The policy would equally be void, against the underwriter, if he concealed; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would be to recover the premium.

"The governing principle is applicable to all contracts and dealings.

"Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary.

"But either party may be innocently silent as to grounds open to both to exercise their judgment upon. *Aliud est celare ; aliud, tacere ; neque enim id est celare quicquid reticeas ; sed cum quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.*

"This definition of concealment, restrained to the efficient motive and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

"There are many matters, as to which the insured may be innocently silent ; he need not mention what the underwriter knows. *Scientia utrinque par pares contrahentes facit.*

"An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew ; what way soever he came to the knowledge.

"The insured need not mention what the underwriter ought to know ; what he takes upon himself the knowledge of ; or what he waives being informed of.

"The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation : as, for instance, the underwriter is bound to know every cause which may occasion natural perils ; as, the difficulty to the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils ; from the ruptures of states ; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace ; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, &c.

"If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, any where, he needs not be told the secret enterprises they are destined upon ; because he knows some expedition must be in view ; and from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two : or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation.

"Men argue differently, from natural phenomena, and political appearances : they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both : each professes to act from his own skill and sagacity ; and, therefore, neither needs to communicate to the other.

"The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts

as vary the nature of the contract ; which one privately knows, and the other is ignorant of, and has no reason to suspect.

“ The question, therefore, must always be whether there was, under all the circumstances at the time the policy was underwritten, a fair representation ; or a concealment ; fraudulent, if designed ; or although not designed, varying materially the object of the policy, and changing the risk understood to be run.”

§ 16. But the rule in Equity is wider than at Law. Sir *J. Romilly*, *M. R. Pulford v. Richards*,<sup>(g)</sup> says as follows :

“ The ground on which relief is asked is that principle of Equity which declares that the wilful misrepresentation of one contracting party, which draws another into a contract, shall, at the option of the person deceived, enable him to avoid or enforce that contract. It will be convenient in the present case to state my view of this principle before applying it to the facts, as they appear to be established by the evidence. The case of this, as well as of most of the great principles on which the system of Equity is founded, is the enforcement of a careful adherence to truth in all the dealings of mankind. This principle is universal in its application to cases of contract. It affects not merely the parties to the agreement, but also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if, in the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered the fact which negatived the representation made—a strong illustration of which is to be found in *Burrowes v. Lock*.<sup>(r)</sup> And I held the same in *Money v. Jorden*.<sup>(s)</sup> This principle applies to all representations made, on the faith of which other persons enter into agreements ; so that, whether the representation were true or false at the time when it was made, he who made it shall not only be restrained from falsifying it thereafter, but shall, if necessary, be compelled to make good the truth of that which he had asserted. The results, however, which flow from the application of this principle differ materially in different cases. In the case where the false representation is made by one who is no party to the agreement entered into on the faith of it, the contract cannot be avoided, and all that Equity can then do is to compel the person who made the representation to make good his assertion as far as may

(g) 22 L. J. Ch. 559-562. Story § 193. 17 Jur. 865.

(r) 10 Ves. 470.

(s) 21. L. J. Ch. 531, 593.

be possible. In cases, however, where the false representation is made by a person who is a party to the agreement, the power of Equity is more extensive, and the contract itself may be set aside, if the nature of the case and condition of the parties will admit of it, or the person who made the assertion may be compelled to make it good. The distinction between the cases where the person deceived is at liberty to avoid the contract, and where the Court will affirm it, giving him compensation only, is not very clearly defined. This question usually arises on the specific performance of contracts for the sale of property; and the principle which governs the cases, though it is, in some instances, of difficult application, and leads to refined distinctions, is the following, namely, that if the representation made be one which can be made good, the party to the contract shall be compelled to do so; *but if the representation made be one which cannot be made good, the party deceived shall be at liberty, if he pleases, to avoid the contract.* Thus, if a man misrepresents the tenure or situation of an estate, as if he says an estate is freehold which proves to be copyhold or leasehold, or if he describes it as situate within a mile of some particular town, when, in truth, it is several miles distant, such a misrepresentation of it, if it cannot be made true, would, at the option of the party deceived, annul the contract; but if the property be subject to incumbrances concealed from the purchaser, the seller must make good his statement and redeem those charges. And even in the case when the property is subject to a small rent not stated, or the rent of it is somewhat less than it was represented, and the Court does not annul the contract, but compels the seller to allow a sufficient deduction from the purchase money, it does so on this principle, that by these means he in fact makes good his representation, and that the statement made was not such as in substance deceived the purchaser as to the nature and quality of the thing he bought. With respect to the character or nature of the misrepresentation itself, it is clear that it may be positive or negative—that it may consist as much in the suppression of what is true as in the assertion of what is false; and it is almost needless to add that it must appear that the person deceived entered into the contract on the faith of it. To use the expression of the Roman Law, so much commented upon in the argument before me, it must be a representation *dans locum contractui*—that is, a representation giving occasion to the contract, the proper interpretation of which appears to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer he would not have entered into it; or the suppression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether.”



§ 17. So in his work on the Law of property as administered by the House of Lords, Sir *Edward Sugden* (Lord *St. Leonards*) remarking on the great case of *Small v. Attwood*,<sup>(f)</sup> writes as follows :—

“ In the great case of *Small v. Attwood*<sup>(g)</sup> the grounds upon which a purchaser is allowed to maintain an action of deceit for damages, or a bill in Equity to rescind the contract on the ground of misrepresentations out of the written contract, were agreed to by all, but upon the application of the rule to the conduct of vendors and purchasers, directly opposite views were taken. It will be proper to state the Law of the case, and then to present the reader with such a general view of the merits of the case as may enable him to apply it as a precedent. It was laid down by Lord *Lyndhurst*, C. B., in deciding the case, that as far as the cases of Law go, where a misrepresentation of a material fact not within the observation of the opposite party is made, the person making the representation, knowing at the time that his statements are untrue, under such circumstances an action may be maintained at Law for the purpose of recovering a compensation in damages for the injury the party has sustained, notwithstanding the contract was in writing, and notwithstanding those particulars may be no part of the terms of the written contract. If that be so, he added, it would follow also that in a Court of Equity a party would be entitled to come forward for the purpose of obtaining redress in order to get rid of a contract founded on such fraudulent misrepresentations.<sup>(h)</sup> This was adopted in the House of Lords by Lord *Devon*,<sup>(i)</sup> who justly observed, with reference to Lord *Eldon's* observation in *Edwards v. M'Leay*,<sup>(j)</sup> that he was not apprised of any similar decision, that we may find an additional reason for the principle that nothing but the most clear and decisive proof of fraudulent representation, made under such circumstances as show that the contract was based upon them—such a case indeed as Lord *Eldon*, in his experience, had not known to occur—would justify the interference of a Court of Equity. Lord *Cottenham*, C., did not dissent from the rule, and Lord *Lyndhurst* repeated that he considered the Law to be clearly settled, that where representations are made with respect to the nature and character of the property which is to become the subject of purchase, affecting the value of that property, and those representations turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of Common Law to recover damages for the deceit so practised, and in a Court of Equity a foundation is laid

(f) 6 Cl. and Fin. 330.

(g) You. 461, 462.

(h) 2 Swanst. 289.

(i) 6 Cl. and Fin. 332; You. 407.

(j) 6 Cl. and Fin.

for setting aside the contract, which was founded on a fraudulent basis.<sup>(y)</sup> Lord *Brougham* stated the rule in the same way,<sup>(z)</sup> and added that the three circumstances must combine, first, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; and thirdly and chiefly, in his view of the case, that it should be this false representation which gave rise to the contracting of the other party. After discussing the cases, he added, that the inference he drew from them was this, that general fraudulent conduct signified nothing, that general dishonesty of purpose signified nothing, that attempts to overreach went for nothing, that an intention and design to deceive might go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, could be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to overreach were enough, he hardly knew a contract even between persons of very strict morality that could stand: they generally found the case to be that there had been an attempt of the one party to overreach the other, and of the other to overreach the first; but that did not make void the contract. The party must not only have been minded to overreach, but he must actually have overreached. Lord *Wynford*<sup>(a)</sup> said that he could not quite agree with Lord *Brougham* that in order to set the contract aside the parties must appear to have been induced *entirely* to enter into it by false representations. He (Lord *Wynford*) said, if the parties were induced fraudulently in any way, although they might have other reasons for entering into the contract, if the strong grounds which prevailed on them to enter into the contract were fraudulent representations, that would give an action in a Court of Law for deceit, and that he should hope would be considered as a sufficient ground in a Court of Equity to set aside such contract.

"To the rule of Law, as qualified and explained in the House of Lords, no exception can be taken."

And in the celebrated case of *Gibson v. D'Este*,<sup>(b)</sup> Lord *Campbell* expressly dissented from the position that an action of deceit could be maintained without positive fraud, and the counsel for the respondent, he said, acquiesced in the view that this was to

(y) 6 Cl. and Fin. 395.

(z) *Ibid.* 444.

(a) 6 Cl. and Fin. 502.

(b) 2 Y. and C. N. S. 542, S. C.

be considered as if it were an action of deceit. There must be a falsehood stated, which is a breach of moral obligation, and that is fraud, which will support an action of deceit. Lord *St. Leonards* commenting upon this *dictum* of the House of Lords, with which he is not satisfied, thus speaks of Sir *W. Grant's* decision in *Edwards v. McLeay*.<sup>(c)</sup> He says:—

“That if a vendor knows and conceals a fact material to the validity of the title, relief is to be afforded to the purchaser. That is the true rule. If the title is fairly before the purchaser, he must rely on his covenants. This rule does not require any representation. If the seller knows a material fact, and conceals it, that is, does not divulge it, he is responsible: his motive is unimportant; he is bound to give the purchaser the means of forming a judgment on the title, and is not to decide what he deems it necessary to disclose.”<sup>(d)</sup>

§ 14. Let us now turn to the division of Fraud into Actual and Constructive. And the first operates either by way of *suggestio falsi* or *suppressio veri*.

§ 15. The *suggestio falsi*: the misrepresentation must be of something material. The most copious illustrations of this doctrine are to be found in the Law of Vendor and Purchaser, and the Law of Marine Insurance. *Story*<sup>(e)</sup> furnishes us with examples which will suffice.

“Thus, if a person, owing an estate, should sell it to another, representing that it contained a valuable mine, which constituted an inducement to the other side to purchase, and the representation were utterly false, the contract for the sale, and the sale itself, if completed, might be avoided for fraud; for the representation would go to the essence of the contract. But if he should represent that it contained twenty acres of wood land or meadow, and the actual quantity was only nineteen acres and three quarters, there, if the difference in quantity would have made no difference to the purchaser in price, value, or otherwise, it would not, on account of its immateriality, have avoided the contract. So, if a person should sell a ship to another, representing her to be five years old, of a certain tonnage, coppered, and copper-fastened, and fully equipped, and found with new sails and rigging; either of these representations, if materially untrue, so as to affect the essence or value of the purchase, would avoid it. But a trifling difference

(c) Coop. 308, S. C. 2, Sw. 287.

(d) Sugden's Law of Property, p. 654.

(e) § 195-8.

in either of these ingredients, in no way impairing the fair value or price, or not material to the purchaser, would have no such effect. Thus, for instance, if the ship was half a ton less in size, was a week more than five years old, was not copper-fastened in some unimportant place, and was deficient in some trifling rope, or had some sails which were in a very slight degree worn; these differences would not avoid the contract; for, under such circumstances the differences must be treated as wholly inconsequential. The rule of the civil Law would here apply: *Res, bonæ fide vendita, propter minimam causam inempta fieri non debet.*"

"So, if an executor of a will should obtain a release from a legatee upon a representation that he had no legacy left him by the will, which was false; or, if a devisee should obtain a release from the heir at law upon a representation that the will was duly executed, when it was not; in each of these cases the release might be set aside for fraud. But if, in point of fact, in the first case, the legacy, though given in the will, had been revoked by a codicil; or, in the second case, if the will had been duly executed, though not at the time, or in the manner, or under the circumstances, stated by the devisee; the misrepresentation would not avoid the release, because it is immaterial to the rights of either party."

"In the next place, says, the misrepresentation must not only be in something material; but it must be in something, in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment. Not but that misrepresentation, even in a matter of opinion, may be relieved against, as a contrivance of fraud, in cases of peculiar relationship or confidence, or where the other party has justly reposed upon it, and has been misled by it. But ordinarily, matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against; because they are not presumed to mislead, or influence the other party when each has equal means of information. Thus, a false opinion, expressed intentionally by the buyer to the seller, of the value of the property offered for sale, where there is no special confidence or relation, or influence between the parties, and, each meets the other on equal grounds, relying on his own judgment is not sufficient to avoid a contract of sale. In such a case the maxim seems to apply; *Scientia, utrinque par, pares contrahentes facit.*"

"But it is otherwise, where a party knowingly places confidence in another, and acts upon his opinion, believing it to be honestly expressed. Thus, if a man of known skill and judgment in paintings should

sell a picture to another, representing it to have been painted by some eminent master, as, for instance, by Rubens, Titian, or Corregio, and it should be false; there can be no doubt, that it would be a misrepresentation, for which the sale might be avoided. And the same principle would apply in a like case, if he should falsely state his opinion to be, that it was a *genuine* painting of a great master, with an intent to influence the buyer in the purchase, and the latter, placing confidence in the skill, and judgment, and assertion of the seller, should complete the purchase on the faith thereof. But if the seller should truly represent the painting to be of such a master, and add, that it once belonged to a nobleman, or was fixed in a church, (which circumstances he knew to be untrue) in such a case, if the representation of these collateral circumstances had no real tendency in the mind of the buyer to enhance or influence the purchase, it would not avoid the contract."

§ 16. And Chancellor *Kent* in his learned Commentaries strikingly puts the doctrine.<sup>(f)</sup>

"When, however, the means of information relative to facts and circumstances, affecting the value of the commodity, are equally accessible to both parties, other, the disclosure of any superior knowledge which one party may have over the other, as to those facts and circumstances, is not requisite to the validity of a contract. There is no breach of any implied confidence, that one party will not profit by his superior knowledge as to facts and circumstances open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence, unless it be specially tendered or required. Each one, in ordinary cases, judges for himself, and relies confidently, and perhaps presumptuously, upon the sufficiency of his own knowledge, skill, and diligence. The Common Law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be

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(f) 2 Vol. Sect. 39, p. 494.

wanting of attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim, *casus, temptor*, ought to apply. Even against this maxim he may provide by requiring the vendor to warrant that which the Law would not imply to be warranted; and if the vendor be wanting in good faith, '*Fides servanda*' is a rule equally enforced at Law and in Equity."

§ 17. But even where the misrepresentation is wilful, yet if it is of such a nature that the party had no right to place any reliance on it and it was his own folly to credit it, he has used his own discretion in the matter, and shall have no relief. In *Vernon v. Keys*,<sup>(9)</sup> Lord *Ellenborough* thus expressed himself.

"If" said he "an action be maintainable for such a false representation of the will and purpose of another, with reference to the purposed sale, should not an action be also at least equally maintainable for a false representation of the party's own purpose? But can it be contended, that an action might be maintained against a man for representing, that he would not give, upon a treaty of purchase, beyond a certain sum; when it could be proved, that he had said, he would give much more than that sum. And supposing also, that he had upon such treaty added as a reason for his resolving not to give beyond a certain sum, that the property was in his judgment damaged in any particular respect; and supposing further, that it could be proved he had, just before the giving such reason, said he was satisfied it was not so damaged; would an action be maintainable for this untrue representation of his own purpose, backed and enforced by this false reason given for it. And in the case before us, does the false representation, made by the defendant, of the determination of his partners, amount to any thing more than a falsely alleged reason for the limited amount of his own offer? And if it amount to no more than this, it should be shown, before we can deem this to be the subject of an action, that, in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule or principle of Law, the party treating for a purchase is bound to allege truly, if he state at all, the motives, which operate with him for treating, or for making the offer, he in fact makes. A seller is unquestionably liable to an action of deceit, if he fraudulently represent the quality of the thing sold to be other than it is, in some particular, which the buyer has not equal means with himself of knowing; or if he do so, in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made. But is

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(9) 12 East. 637.

a buyer liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity, than the price, which such proposed buyer offers? I am not aware of any case, or recognised principle of law, upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely gratis *dictum* by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely; and for the consequences of which reliance, therefore, he can maintain no action."

§ 18. This passage is suggestive: but Equity, if it would not set aside, would not specifically enforce, a contract under such circumstances, if the party seemed materially to have been influenced.

§ 19. The party must have been in fact misled by the representation. If he knew that the representation was false, it could not influence his conduct. He is the victim of his own folly, not of another man's imposition. *Non decipitur qui scit se decipi.*

§ 20. He must have been misled to his injury; for Courts of Equity, says *Story*, do not, any more than Courts of Law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that, to support an action at law for a misrepresentation, there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff. And it has been observed with equal truth by a very learned Judge in Equity, that "fraud and damage coupled together will entitle the injured party to relief in any Court of Justice."

§ 21. We come now to *Suppressio veri*: concealment of the truth. Here the concealment must operate to the prejudice of another. Nor is it every concealment which gives a cause of suit. The suppression of facts must be of those which one party is bound by a *duty* to disclose to the other, and in respect to which he cannot be innocently silent. In the words of *Cicero*:

"*Aliud est celare, aliud tacere. Neque enim id est celare, quicquid reticeas; sed cum, quod tu scias, id ignorare emolumentum tui casu velis eos, quorum interit id scire.*"

§ 22. The doctrine of the moralist may be read in *Paley*.<sup>(4)</sup>

"To advance" says he, "a direct falsehood in recommendation of our wares, by ascribing to them some quality, which we know they have not, is dishonest. Now compare with this the designed concealment of some fault, which we know they have. The motives and effects of actions are the only points of comparison in which their moral quality can differ. But the motives in these two cases are the same, namely, to produce a higher price than we expect otherwise to obtain; the effect, that is, the prejudice to the buyer is the same."

§ 23. But the Law does not go so far: it does not profess to enforce merely moral obligations, and its rule has been well laid down by Lord *Thurlow* in the Leading case of *Fox v. Mackreth*.<sup>(5)</sup> There it was said—

"That if A., knowing there to be a mine in the land of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase the estate of B. for a price, which the estate would be worth without considering the mine, the contract would be good; because A., as the buyer, is not obliged, from the nature of the contract, to make the discovery. In such cases, the question is not, whether an advantage has been taken, which in point of morals is wrong, or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also, that there should be some obligation on the party to make the discovery. A Court of Equity will not correct, or avoid a contract, merely because a man of nice honour would not have entered into it. The case must fall within some definition of fraud; and the rule must be drawn, so as not to affect the general transactions of mankind.

"The true definition, then, of undue concealment, which amounts to a fraud in the sense of a Court of Equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other; and which the latter has a right, not merely in *foro conscientie*, but *juris et de jure*, to know."

§ 24. Where a man professes to sell an estate, *knowing* that he has no title to it, or conceals mortgages, or other incumbrances upon it, or sells a house or ship, *knowing* it to have

(4) Mor. Ph. B. 3. Ch. 7.

(5) 2 Br. Ch. C. 400, S. O. 2. Cox. 320 S. C. T. & W. L. C. on Eq. Vol. I. p. 92.



been burnt or foundered, the sale shall not stand. For here there is a fraudulent concealment intrinsic in the contract and constituting its very essence. *Fraus in reipsâ. Qui tacet, consentire videtur. Fraus est celare fraudem.* And it is necessary in cases of this sort to consider whether the concealment goes to the intrinsic contract, or is *extrinsic* to it. In the former case, the contract is always void; in the latter, it will depend upon the character of the extrinsic circumstances not disclosed. They may so vitally affect the contract, as to render it voidable: or they may be of such trivial character, as not to affect it, at least in the eye of the Law, however the matter may appear to the mind of the moralist.

"There is often a material distinction" writes *Story*,<sup>(1)</sup> "between circumstances which are intrinsic, and form the very ingredients of the contract, and circumstances which are extrinsic, and form no part of it, although they may create inducements to enter into it, or affect the value or price of the thing sold. Intrinsic circumstances are properly those which belong to the nature, character, condition, title, safety, use, or enjoyment, &c. of the subject-matter of the contract; such as natural or artificial defects in the subject-matter. Extrinsic circumstances are properly those which are accidentally connected with it, or rather bear upon it, at the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract; such as facts respecting the occurrence of peace or war, the rise or fall of markets, the character of neighbourhood, the increase or diminution of duties, or the like circumstances."

§ 25 As to matters intrinsic to the contract, unless there be misrepresentation or a warranty, the rule *Caveat Emptor* applies: though it is perhaps to be regretted that the more liberal rule of the Roman Law was not followed by our jurists, as more nearly approaching to the moral Code.

"The Roman Law required" says *Story*,<sup>(2)</sup> "the utmost good faith in all cases of contracts, involving mutual interests; and it, therefore, not only prohibited the assertion of any falsehood, but also the suppression of any facts, touching the subject matter of the contract, of which the other party was ignorant, and which he had an interest in knowing. In an especial manner it applied this doctrine to cases of sale; and required that the vendor and vendee should disclose, each to the other, every circumstance

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(1) § 210.

(2) § 211.

within his knowledge, touching the thing sold, which either had an interest in knowing. The declaration in regard to the vendor (as we have seen) is; *Dolum malum a se abesse præstare venditor debet; qui non tantum in eest, qui fallendi causâ obscure loquitur; sed etiam, qui insidiosè, obscure dissimulat*; and the same rule was applied to the vendee."

§ 28. But the attention of the Judge is always to be directed to the relation of the parties, where the silence is in fact a breach of trust. Thus where a party takes a guarantee for a third party's acts, any concealment of material facts which go to increase the surety's risk will void the guarantee.<sup>(1)</sup> Copious illustrations of this doctrine are to be found in the decided cases upon Marine Insurance, where the assured is bound to disclose every fact within his knowledge: or the underwriter will not be liable; and whether they are concealed by accident or design, the concealment equally voids the policy.

§ 29. So in all cases where the relation of the parties imposed an obligation to observe towards each other *uberrima fides*. So in matters of family arrangement: in transactions between Trustee and *Cestui que trust*; Principal and Agent; Partners; and the like. In illustration of this, take the leading case of *Fox v. Mackreth* above referred to, where "a trustee for the sale of estates for payment of debts, who purchased them himself, by taking an undue advantage of the confidence reposed in him by the plaintiff and previous to the completion of the contract sold them at a highly advanced price, decreed to be a trustee, as to the sums produced by the second sale, for the original vendor."

§ 30. This case has established the rule—

"That a purchase by a trustee for sale from his *cestui que trust*, although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the *cestui que trust*, unless the connection between them, most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his *cestui que trust*. "It is founded" "observes Lord *Eldon*," upon this; that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence, in the Power of the Court

(1) See *N. B. Ass. Cy. v. Lloyd*, 19. Jur. et ibi *casus*.

by which I mean in the power of the parties) in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and, by the knowledge acquired in that character, discovers a valuable coal-mine under it, and, looking that up in his own breast, enters into a contract with the *cestui que* trust; if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que* trust will be effectually defrauded.”<sup>(m)</sup>

It is not necessary to prove an under price. Whatever may have been the price paid, a principal selling to his agent is at liberty to set aside the sale on equitable grounds, per Sir *E. Sugden*, C., in *Murphy v. O'Shea*.<sup>(n)</sup>

§ 31. This doctrine is applied to all persons standing in fiduciary relations to each other. Thus an Agent or Solicitor<sup>(o)</sup> employed to sell, cannot purchase from his principal, unless she makes it clear that he has furnished his employer with all the knowledge which he himself possessed; and Courts of Equity watch those transactions very closely indeed. So, an agent employed to purchase, purchasing for himself, will be held a Trustee for his principal. Nor shall he even make a profit to himself in the transaction, unless with the express consent of his employer. In the *East India Company v. Henchman*,<sup>(p)</sup> Lord *Thurlow* says—

“If being a factor he buys up goods, which he ought to furnish as factor; and instead of charging factorage duty, or accepting a stipulated salary, he takes the profits, and deals with his constituents as a merchant, that is a fraud, upon which an account is due.”

So a partner purchasing for his firm shall not make a profit in which they are not entitled to share. An agent employed on a salary, cannot derive a profit to himself. So also of a stock broker paid by the job, employed to buy or sell paper or stocks; so executors and administrators cannot purchase any of the assets of the estates they represent. Neither shall they receive benefit from compounding mortgages and the like due by the testator, or intestate. Assignees of Bankrupts and Insolvents are in the same position. So of an arbitrator. In *Blennerhassett v. Day*,<sup>(q)</sup> Lord *Manners* said—

(m) *Ex parte Lacey*. 6. Ves. 627.

(o) See *Holman v. Laymes*, 18 Jur. 839.

(n) 9 J. and L. 420.

(p) 1. Ves. Junr. 289.

(q) 2. Ball and B. 116.

"That he should purchase an interest in those rights, upon which he was to adjudicate, could not be endured. It would indeed be to corrupt the Fountain, and it would not only contaminate the Award."

So also in respect to transactions between Guardian and Ward. Nor can a Plaintiff, in a suit to foreclose a mortgage, be allowed to bid at the sale, without express leave first granted by the Court.

§ 32. We have already had occasion to allude to the cases of lunatics, infants, and persons, *non compotes*, whether from weakness of intellect, or not being *sui juris*, from age, coverture, and the like.

§ 33. The ground on which Equity relieves in such cases, is *Fraud*: for such persons being incapable of entering into any valid contract, it behoves parties dealing with them to take cognizance of their condition, and if in spite of this the transaction be persisted in, there arises a very strong presumption of meditated imposition. No persons deserve to be more favoured by the law than those who are too helpless to protect their own rights, for they are powerless against the designs of the fraudulent, the cunning, the avaricious, the heartless. And Equity will set aside the most solemn transactions where such parties are interested, wherever there is not *uberrima fides*; though it will uphold the transaction where it is for their benefit, even against those who seek to set it aside, on the ground that the party is an infant, or otherwise not *sui juris*. Thus, where articles have been entered into for a settlement previous to the marriage of an infant, they shall not be held binding on her, if not for her benefit; but the Court will decree a strict settlement of such antenuptial articles, if they are clearly for her benefit. Thus in the case of *Moody v. Dashwoods, infants*, heard in the Madras Supreme Court during the 3rd Term of the year 1858, where the question was whether the deceased mother of the infant plaintiffs had severed a joint tenancy by her executing, while an infant, articles of settlement previous to her marriage, by which she covenanted on coming of age to execute a regular settlement, the Court held, that these articles and the covenant (which she died without executing) in point of law operated as a severance of the joint tenancy, and the terms of the articles being for the benefit of the deceased and her children, the Court decreed them to be specifically performed.

§ 34. So with respect to acts done under the influence of intoxication.

"Although" says *Story*, "it is regularly true, that drunkenness doth not extenuate any act or offence, committed by any person against the laws; but it rather aggravates it, and he shall gain no privilege thereby; and although, in strictness of law, the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*; yet Courts of Equity will relieve against acts done, and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party. For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of Courts of Equity against his own grossly immoral and fraudulent conduct.

"But to set aside any act or contract on account of drunkenness, it is not sufficient, that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part; and without this, no contract or other act can or ought to be binding by the Law of nature. If there be not that degree of excessive drunkenness, then Courts of Equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him. For, in general, Courts of Equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at Law, unless there is some fraudulent contrivance or some imposition practised."

§ 35. So weakness of intellect, not positively amounting to insanity or legal incapacity, constitutes a most material ingredient in examining whether a contract has been entered into under any undue influence. It is true that Courts of Equity will not set themselves up to measure men's capacities by very nice rules; nor will they relieve against what are called hard bargains, or aid the rash and the improvident; but yet the same transaction which may be unimpeachable, where the party complaining has only acted

improvidently, may give rise to a presumption of fraud or circumvention, where it has been entered into with a party of weak intellect. And Lord *Wynford* in *Blackford v. Christian*<sup>(r)</sup> laid down the Law as follows:—

“The Law,” said Lord *Wynford*, “will not assist a man who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no Court of Justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property. Indeed, from the fluctuation of prices, owing principally to the gambling spirit of speculation that now unhappily prevails, it would be difficult to determine what is an inadequate price for anything sold. At the time of the sale the buyer probably calculates on a rise in the value of the article bought, of which he would have the advantage. He must not, therefore, complain, if his speculations are disappointed, and he becomes a loser, instead of a gainer by his bargain. But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the Law. The strongest mind cannot always contend with deceit and falsehood. A bargain, therefore, into which a weak one is drawn under the influence of either of these, ought not to be held valid; for the Law requires, that good faith should be observed in all transactions between man and man.”

§ 36. The doctrine, therefore, may be laid down, as generally true, that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in Courts of Equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome, by cunning, or artifice, or undue influence.

§ 37. Cases of an analogous nature may easily be put, where the party is subjected to undue influence, although in other respects of competent understanding. As where he does an act, or makes a contract, when he is under duress, or the influence of extreme terror, or of threats, or of apprehensions, short of duress. For in cases of this sort he has no free will, but stands *in vinculis*. And the constant rule in Equity is, that where a party is not a

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(r) 1. Knapp. 77.

free agent, and is not equal to protecting himself, the Court will protect him. The maxim of the Common Law is ; *Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur*. On this account Courts of Equity watch with extreme jealousy all contracts made by a party while under imprisonment; and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside. Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency, as to justify the Court in setting aside a contract made by him on account of some oppression, or fraudulent advantage, or imposition, attendant upon it.<sup>(d)</sup> *Nihil consensui tam contrarium est quam vis atque metus*.

§ 38. Of a kindred nature to the cases already considered, are cases of bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud to which Lord *Hardwicke* alluded in the passage already cited, when he said that they were such bargains as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, being inequitable and unconscientious bargains. Mere inadequacy of price, or any other inequality in the bargain is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in Equity. For Courts of Equity, as well as Courts of Law, act upon the ground, that every person, who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or otherwise; or profitable, or unprofitable; are considerations, not for Courts of Justice, but for the party himself to deliberate upon.

Inadequacy of consideration is not, then, of itself, a distinct principle of relief in Equity. The Common Law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is, what it will produce; and it admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different

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(d) See 16 *Jur.* 909.

circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under pressure to circumstances, which may induce him to part with it at a particular time. If Courts of Equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting a doctrine, that mere inadequacy of consideration should form a distinct ground for relief.

Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases Courts of Equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out, as would, (to use an expressive phrase,) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud.

§ 39. The leading case upon this point is that of the *Earl of Chesterfield v. Sir Abraham Janssen*<sup>(t)</sup> already referred to. The whole case and the note appended should be studied in *Tudor and White's Leading Cases*.

§ 40. To come now to cases of constructive Frauds: which are thus explained by *Story*.

"By constructive frauds are meant such acts or contracts, as, though not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by Law, as within the same reason and mischief, as acts and contracts done *malò animo*. Although, at first view, the doctrines on this subject may seem to be of an artificial, if not of an arbitrary, character; yet upon closer observation, they will be found to be founded in an anxious desire of the Law to apply the principle of preventive justice, so as to shut out:

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(t) 2 Ves. 125. 1. T. and W. L. C. in Eq. p. 429.



the inducements to perpetrate a wrong, rather than to rely on mere remedial justice, after the wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragements, which might otherwise be found too strong for their virtue.

"Some of the cases under this head are principally so treated, because they are contrary to some general public policy, or to some fixed artificial policy of the Law. Others, again, rather grow out of some special confidential or fiduciary relation between the parties, or some of them, which is watched with especial jealousy and solicitude, because it affords the power and the means of taking undue advantage, or of exercising undue influence over others. And others again are to a mixed character, combining in some degree, the ingredients of the preceding with others of a peculiar nature; but they are chiefly prohibited, because they operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons; or unconscientiously compromise, or injuriously affect, the private interests, rights, or duties of the parties themselves." And wherever any thing is forbidden, the Law will not connive at its evasion by any circuitous route, its accomplishment by cunningly devised means which may themselves be apparently lawful and harmless. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.*"

§ 41. The first class void against public policy are contracts in respect of marriage; whether to bring marriages about, which are called Marriage Brokage contracts, or conditions in restraint of marriage in general. These matters are not likely to occur in the practice of the Indian Judge, and may therefore be noticed cursorily.

§ 42. As to Marriage Brokage contracts. Suffice it to say that they are utterly void, in whatever form they may appear, or in whatever language they may be couched.

"Be the foundation of the doctrine," says *Storey*, "however, what it may, it is now firmly established, that all such Marriage Brokage contracts are utterly void, as against public policy; so much so, that they are deemed incapable of confirmation; and even money paid under them may be recovered back again in a Court of Equity. Nor will it make any difference, that the marriage is between persons of equal rank, and fortune, and age; for the contract is equally open to objection upon general principles, as of dangerous consequences."

§ 43. Further, it is a constructive fraud upon marital rights for a woman in contemplation of marriage to settle her separate property to her own use, without the knowledge of her intended husband. This case is not likely to arise in practice, and I shall therefore simply refer to the case of *Countess of Strathmore v. Bowes*,<sup>(u)</sup> which will be found in the 1st Vol. of *Tudor and Whites* L. C. in Equity p. 325, where the whole Law on this point is discussed in the Notes.

§ 44. The other branch of this subject is that of conditions in restraint of marriage. Here again it will suffice to refer to the great case of *Scott v. Tyler*<sup>(v)</sup> which has been selected of *Tudor and White*.<sup>(b)</sup> There the whole history of the Law is traced.

§ 45. But while the Law refuses to sanction any condition in restraint of marriage in general, it will uphold conditions which lay down such reasonable and provident restrictions as tend to protect the individual from hasty and rash marriages.

§ 46. A condition annexed to a gift to a woman to induce her to separate from her husband is void as being against public policy. But an annuity to a widow *durante viduitate* is good. So a general condition in restraint of marriage with the Testator's widow was upheld. Until the Hindoos generally recognize the legality of remarriage of widows, this is not likely to call for much attention at the hands of the Judge.

§ 47. The next illustration of constructive frauds, void as being against public policy, may be taken from conditions in restraint of trade generally. These contracts are not likely to occur in the interior, and it may suffice therefore to call the attention of the reader to the case of *Mitchell v. Reynolds*,<sup>(w)</sup> which together with a luminous note, will be found in *Smith's* L. C.<sup>(x)</sup>

§ 48. But a clear distinction is drawn between covenants not to trade generally, and covenants not to trade in particular named localities, or with certain specified classes or individuals. So in *Malian v. May*,<sup>(y)</sup> it was held that :

(u) 1. Ves. Jur. 22.

(w) 1 P. Wms. 181.

(v) Vol. 2, page 165.

(x) 1st Vol. p. 289.

(y) XI. M. and W. 653.

"Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made, is unreasonable and void, as injurious to the interests of the public, on the ground of public policy."

§ 49. So engagements by parties not to bid against each other at public auction cannot be sustained. So if puffers or secret bidders enhance the price at an auction. So if the auctioneer purchases in for himself, a practice too prevalent in Madras.

§ 50. So the assignment of half pay of an officer is void. See *Davis v. Duke of Marlborough*.<sup>(c)</sup> See also *Nisbit v. Kings College*.<sup>(a)</sup>

§ 51. So of wager contracts.<sup>(b)</sup> See the Bombay Opium Case. With regard to gambling the Roman Law contained a wholesome provision.<sup>(c)</sup>

*Victum in aleæ lusu, non posse conveniri. Et, si solverit, habere repetitionem, tum ipsum, quam hæredes ejus adversus victorem et ejus hæredes; idque perpetuo, et etiam post triginta annos.* Thirty years was the general limitation of rights in other cases.

§ 52. So of contracts tending to maintenance or champerty. These practices are only too common in India, and suits are constantly promoted and fomented by the malicious or corrupt interference of third parties.

"Maintenance," says *Blackstone* "is punished in the same manner: (as champerty) being a bargain with a plaintiff or, defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at Law; whereupon the champertor is to carry on the party's suit at his own expense. Thus champart, in the French Law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our Law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at Common Law; because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman

(a) 1 Sw. 74, 97.

(a) xi. Jur. 506. and ib. pt. 2, p. 503.

(b) 8 and 9 Vic. C. 109, § 18.

(c) Cod. l. 3. Tit. 43, l. 1.

Law: '*qui improbe cœunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privatâ tenentur*,' and they were punished by the forfeiture of a third part of their goods, and perpetual infamy."

In *Prossir v. Edmonds*<sup>(d)</sup> it was held that—

"An assignment of a bare right to file a bill in Equity for a fraud committed on the assignor, is contrary to sound policy, and void: therefore, where *A.*, who was entitled to certain property under his father's will, for a valuable consideration, assigned the whole of that property (except a reversionary interest in the funds) to *B.*, his father's executor, and afterwards assigned the whole of his interest under his father's will (including, therefore, the reversionary interest) to *C.*:—*Held*, that *C.* could not maintain a bill to set aside the first assignment, on the ground of fraud committed by *B.* against *A.*, the latter refusing to join as plaintiff in the suit.

"A chose in action, not coupled with any partial interest in possession, and which cannot be reduced into possession without a suit, is not assignable in Equity.

"Courts of Equity will give no encouragement to contracts which savour of maintenance or champerty, though such contracts may not be within the strict legal limits assigned to those offences."

§ 53. The question of maintenance and champerty has been several times before the Madras Sudder Court within the last three years. It will be found discussed in the following cases. S. A. 57 of 1857, S. R. for 1858, p. 46, S. A. 44 of 1858, S. R. for 1858, p. 151, S. A. 129 of 129 of 1856, S. R. for 1856, p. 204, S. A. 115 of 1858, S. R. for 1859, p. 8. It is to be observed however that the doctrine of maintenance and champerty has undergone much modification in England since the time when *Blackstone* wrote. The following observations from the Jurist for 1857, (pt. 2, p. 171) may be usefully perused.

"Few branches of our law have undergone greater modification by change of opinion alone, and without any statutory interference, than that which relates to the maintenance of suits and actions. So jealous formerly were our judges of the intervention of third parties in litigation, that they adopted and promulgated views upon the subject which at the pre-

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(d) 1, Y. and C. p. 481.

sent day appear to be absurd and extreme. The influence exercised by power and wealth over witnesses, jurors, and it may be judges, was doubtless stronger in former times than in our own, and often so strong and so corrupt as to work manifest injustice; but still we can hardly understand the state of society in which it was considered necessary, by judicial decision, to bring within the offence of maintenance such apparently innocent acts as to persuade one to be counsel for another gratis—to go with another to inquire for a person learned in the law—for a juror to solicit a judge to give judgment according to the verdict—for a man of power and interest to stand by another while his cause was being tried, though he said nothing—or for a man of power, not learned in the law, telling another, who asked his advice, that he had a good title: The extreme opinions, however, which prevailed upon this subject are doubtless long since exploded, but the effect of the old doctrine of maintenance is still felt in the rule upheld by our common-law Courts, that a chose in action is not assignable so as to give the assignee a right of action in his own name. Upon this point we cannot do better than cite the clear and forcible observations of *Buller, J.*, in *Master v. Miller*, (4 T. R. 320, 340). “It is laid down,” said that learned Judge, “in our old books, that for avoiding maintenance a chose in action cannot be assigned or granted over to another. The good sense of that rule seems to me to be very questionable, and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of action in any case. In 2 Roll. Ab. 45, 46, it is admitted that an obligation or other deed may be granted so that the writing passes; but it is said that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name or in the name of the grantor does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received at Westminster Hall. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise have been put to, was held guilty of maintenance. (Bro. Ab., tit. ‘Maintenance,’ 7, 14, 17, &c.) Nay, if he officiously gave evidence it was maintenance; so that he must have had a subpœna, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside must be expected. Accordingly a variety of exceptions was soon made; and, amongst others, it was held, that if a person has any interest in the thing in difference, though on contingency only, he may lawfully maintain an action on it. (2 Roll. Ab.

115.) But, in the midst of all these doctrines on maintenance, there was one case in which the Courts of law allowed of an assignment of a chose in action, and that was in the case of the Crown; for the Courts did not feel themselves bold enough to tie up the property of the Crown, or to prevent that from being transferred. (3 Leon. 198; 2 Cro. 188.) Courts of Equity from the earliest times thought the doctrine too absurd for them to adopt, and therefore they always acted in direct contradiction to it; and we shall soon see that Courts of law also altered their language on the subject very much. In 12 Mod. 554, the Court speaks of an assignment of an apprentice or an assignment of a bond as things which are good between the parties, and to which they must give their sanction, and act upon. So an assignment of a chose in action has always been held a good consideration for a promise. It was so in 1 Roll. Ab. 29; Sid. 212; and Jones, 222; and lastly, by all the judges of England in *Mouldale v. Birchall*, (2 Bl. 820), though the debt assigned was uncertain. After these cases we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted, that though the Courts of law have gone the length of taking notice of assignments of choses in action, and of acting upon them, yet in many cases they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not of the assignee. I see no use or convenience in the preserving that shadow when the substance is gone; and that it is merely a shadow is apparent from the later cases, in which the Courts have taken care that it shall never work injustice.

"It is time to alter this rule of law, and to recognise in all our Courts, for all purposes, the rights pertaining to an assignee of choses in action. We doubt also whether the whole doctrine of maintenance may not be usefully swept from our laws; for, after all, what offence is there in aiding a man to assert his rightful claims—and on questions of maintenance they are assumed to be rightful—or what legal damage is sustained by him against whom such rights are asserted? The malicious instigation of suits and actions without reasonable or probable cause is a very different matter; but for this an action will lie, quite independently of the doctrine of maintenance. It is analogous to the action for a malicious prosecution, as was said by *Patteson, J.*, in the case of *Flight v. Leman*, (4 Q. B. 883). (See also *Peckell v. Watson*, 8 M. & W. 691.)

"With regard to champerty, which is but a species of maintenance, it is difficult to see why parties should not be allowed to settle for them-

selves terms of payment for services rendered. If the "campi partitio" appears to them a better mode of remuneration than a gross sum of money, why should they not adopt it? The Common Law and the rules of Equity would be sufficient, we presume, without resorting to maintenance or champerty, to meet cases of fraud and undue advantage, and also to render illegal such an agreement as came to light in *Sprye v. Porter*, (3 Jur., N. S., part I, p. 330)—namely, to *supply sufficient evidence* to recover property, in consideration of having a share of it."

§ 53. Contracts for the sale of public offices are void. Especially odious are such contracts for the sale of any office connected with the administration of justice. It is to be feared that the peculiar position of public men in India, the sudden emergencies of sickness and the like, have given rise to a somewhat lax morality in this respect; and that arrangements are constantly made between parties mutually desirous of throwing up and securing an appointment. The purchase of a house and furniture, or the like, is made a condition precedent of quitting: agreements which I conceive on the soundest principles of public morality could not be enforced, if the question were raised.<sup>(e)</sup>

"It is obvious," writes *Story* "that all such contracts must have a material influence to diminish the respectability and purity of public officers and to introduce a system of official patronage, corruption, and deceit, wholly at war with the public interests. The confidence of public officers may thereby not only be abused and perverted to the worst purposes; but mischievous arrangements may be made to the injury of the public; and persons may be introduced or kept in office, who are utterly unqualified to discharge the proper functions of their stations. Such contracts are justly deemed contracts of moral turpitude; and are calculated to betray the public interests into the administration of the weak, the profligate, the selfish and the cunning. They are, therefore, held utterly void, as contrary to the soundest public policy; and, indeed, as a constructive fraud upon the government. It is acting against the spirit of the constitution of a free government, by which it ought to be served by fit and able persons, recommended by the proper officers of the Government for their abilities, and from motives of disinterested purity. It has been strongly remarked, that there is no rule better established (it should be added, in Law and reason, for unfortunately it is often otherwise in practice) respecting the disposition of every office, in which the public are concerned, than this, *Detur Digniori*. On

(e) See *E. I. Company v. Neave*, 5 Ves. 137.

principles of public policy no money consideration ought to influence the appointment to such offices. It was observed of old, that the sale of offices accomplished the ruin of the Roman Republic. '*Nulla alia re magis Romana Respublica interit quam quod magistratus officia venalia erant,*' and by our own Law the traffic in offices is made penal.<sup>(f)</sup> Contracts for or respecting the sale or transfer of public appointments, though they may not be prohibited in the particular cases by the statutes relative to the sale of public offices, which we shall hereafter notice, may still be void at Common Law, as being contrary to public policy.

"Thus, where the defendant, in consideration that the plaintiff, who was master joiner in one of his Majesty's dockyards, would procure himself to be superannuated, undertook, in case he, the defendant, should succeed the plaintiff as master joiner, to allow him the extra pay from the yard books: it was held that this agreement, having been made without the knowledge of the Navy Board, to whom the appointment belonged, was void. So a recommendation to an office in the King's household, though of a private nature, and not within the Stat. 5 and 6 Edw: 3, does not form a legal consideration for a contract. Nor could an action be maintained upon an agreement for the sale, by the owner, of the command of a ship in the East India Company's service, made without the sanction, and in violation of the bye-laws of the Company. So a Court of Equity has refused to carry into execution an agreement to assign the fees of a gaoler, and the profits of a tap-house connected with the gaol. But a contract for an exchange of the command of East India ships, entered into with the knowledge of the Company, has been held to be good."

§ 54. "Another class of agreements," he continues "which are held to be void on account of their being against public policy, are such as are founded upon corrupt considerations, or moral turpitude, whether they stand prohibited by statute or not; for these are treated as frauds upon the public or moral Law. The rule of the Civil Law, on this subject, speaks but the language of universal justice. *Pacta, quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est.*

"It is but applying a preventive check, by withholding every encouragement from wrong, and aiming thereby to enforce the obligations of virtue. For although the Law, as a science, must necessarily leave many moral precepts without due enforcement, as rules of imperfect obligation only, it is most studious not thereby to lend the

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(f) See Stat: 5 and 6 Edward III. c. 16, S. 2 and 3.



alightest countenance to the violations of such precepts. Wherever the Divine Law, or the Positive Law, or the Common Law, prohibits the doing of certain acts, or enjoins the discharge of certain duties, any agreement to do such acts, or not to discharge such duties, is against the dearest interests of society and therefore is held void; for otherwise the Law would be open to the just reproach of winking at crimes and omissions, or tolerating in one form what it affected to reprobate in another. Hence, all agreements, bonds, and securities, given as a price for future illicit intercourse. (*Premium pudoris*) or for the commission of a public crime, or for the violation of a public Law, or for the omission of a public duty, are deemed incapable of confirmation or enforcement, upon the maxim, *Ex turpi contractu non oritur actio*."

§ 55. What are such contracts may be learnt by a study of the great case of *Collins v. Blantern*<sup>(g)</sup> and the note to it in *Smith's Leading cases*.<sup>(h)</sup>

There, Lord Chief Justice *Wilmot* answering the second question which he proposed to himself, whether a bond given for an illegal consideration is not clearly void at Common Law *ab initio*, said—

"As to the second point, we are all of opinion that the bond is void *ab initio*, by the Common Law, by the Civil Law, Moral Law, and all Laws whatever; and it is so held by all writers whatsoever upon this subject, except in one passage in *Grotius*,<sup>(i)</sup> where I think he is greatly mistaken, and differs from *Puffendorf*,<sup>(j)</sup> who, in my opinion, convicts the doctrine of *Grotius*. In *Justin*<sup>(k)</sup> *de turpi causa*, Sect. 23. *Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet*. And *Vinnius*, in his commentary, carries it so far as to say, you shall not stipulate or promise to pay money to a man not to do a crime, *Si quis pecuniam promiserit, ne furtum aut cædem faceret, aut sub conditione, si non fecerit, adhuc dicendum stipulationem nullius esse momenti; cum hoc ipsum flagitiosum est, pecuniam pacisci quo flagitio absteineas*<sup>(l)</sup> to the same point.

"This is a contract to tempt a man to transgress the Law, to do that which is injurious to the community: it is void by the Common Law; and the reason why the Common Law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our Law agree in this, no polluted hand shall touch the

(g) 2 Wils. 341.

(h) 1 Vol. p. 262.

(i) Lib. 2 Cap. 11 Sect. 9.

(j) Lib. 3 Cap. 8. Sect. 8.

(k) Inst. Lib. 3 tit. 20.

(l) Dig. lib. 1. tit. 5. Code, li. bi. tt. 47.

pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again, you shall not have a right of action when you come into a Court of justice in this unclean manner to recover it back. *Procul, O! procul este profani.*"<sup>(m)</sup>

§ 56. It may not be out of place however shortly to summarize the various descriptions of contract which are void on the score of illegality. Some of them have been incidentally remarked upon already. Some contracts are void for illegality at Common Law; others are expressly rendered so by Statute.

§ 57. Contracts void at Common Law may be classified under three heads: 1st, Immoral Contracts; 2nd, Those contrary to public policy; 3rd Fraudulent Contracts.

§ 58. 1st. Immoral Contracts. An agreement for future illicit cohabitation is void: past cohabitation is only a sufficient consideration for a contract *under seal*.<sup>(n)</sup> Past *seduction* stands on the same footing.<sup>(o)</sup> So the rent of lodgings for the purposes of prostitution is not recoverable, nor can the price of libellous, immoral, atheistical, and other similar publication be recovered.

(m) The whole of the 4th Chapter of *Chitty* on Contracts should be here studied.

(n) See cases—*Chitty* on Contracts, p. 46.

(o) The following note of cases in which relief has been given or refused (taken from 13 Jur. pt.

1. p. 799) may be found useful.

*Bill by Man for relief.*

*Relief given.*

*Sisney v. Eli*, (ante, p. 480—V. C. E.)

*Relief refused.*

*Bodily v. —*, (3 Ch. Cas. 15—1680, Lord Nottinghamham.)

*Whaley v. Norton*, (1 Vern. 482—1687, Sir T. Trevor, M. R.)

*Bainham v. Manning*, (2 Vern. 242—1691, Lords Commissioners).

*Spicer v. Hayward*, (Prec. in Ch. 114—Wright L.K.)

*Dillon v. Jones*, (cited 5 Ves. 290—Lord Bathurst).

*Franco v. Bolton*, (3 Ves. 368).

*Batty v. Chester*, (5 Beav. 103).

*Smyth v. Griffin*, (13 Sim. 245).

*Benyon v. Nettlefold*, (supra):

*Bill by Woman for relief.*

*Relief given.*

*Knye v. Moore*, (1 S. & S. 61).

*Relief refused.*

*Priest v. Parrot*, (3 Ves. 160—1751).

§ 59. 2nd. Contracts against public policy; these are general contracts in restraint of trade: contracts clearly prejudicial to and affecting the revenue<sup>(p)</sup>; marriage brokerage contracts; and *general* conditions in restraint of marriage: deeds for *future* separation of man and wife: contracts for sale of public offices: contracts affecting bribery or impeding the course of justice, as compounding a felony, telling a witness to keep away;<sup>(q)</sup> contracts of maintenance and champerty; agreements to fight, as tending to create a breach of the peace; agreements tending to make public officers neglect their duty: so trading with an enemy: agreements for avoiding a public statute: agreements to oust the jurisdiction of the Courts of the land.

§ 60. 3rd. Fraudulent Contracts; on this we have said enough.

§ 61. Some of the contracts expressly rendered illegal by statute may also be mentioned; though the subject is of less importance, as the Statute Law does not apply to India, unless expressly provided for. Therefore such matters as Mortmain charitable uses, charges on benefices, contracts made on Sunday, stock-jobbing, illegal companies, it is scarcely worth while to notice. The Usury Laws have been abolished by 17 and 18 Vic. C. 90, and in this country by Act 28 of 1855.

§ 62. Where a contract is positively void by Law, or contrary to public policy, it cannot be confirmed. Sometimes an act indifferent in itself, or even in its origin illegal, may ripen into at

*Bill by Executor of Man for relief.*

*Relief given.*

*Matthew v. Hanbury*, (2 Vern. 187—1690).

*Robinson v. Cox*, (9 Mod. 263—1741, Lord

Hardwicke).

*Clarke v. Periam*, (2 Atk. 333).

*Relief refused.*

*Cray v. Cooke*, (Forrest Ca. t. Talb. 153—1735).

*Hill v. Spencer*, (Amb. 641, 836—1767).

*Gray v. Matthias*, (5 Ves. 286—1800, Exchequer).

*Bill by Woman against Representatives of Man.*

*Relief given.*

*The Marchioness of Annandale v. Harris*, (2 P. W. 432—1727).

*Hall v. Palmer*, (3 Hare, 532).

*Relief refused.*

*Clarke v. Periam*, (2 Atk. 333—1742).

*Particeps criminis allowed to sue.*

*St. John v. St. John*, (11 Ves. 535).

*Harrington v. Duchatel*, (1 Bro. C. C. 124).

*Neville v. Wilkinson*, (Id. 543).

(p) *Smith v. Mawhood* 14 M. and W. 452.

(q) See *Collins v. Blizard*.

positive right by the acquiescence of the other party and by lapse of time, as in the case of possession wrongfully taken, after 20 years. But this shall never be in regard to contracts void *ab initio*. *Quod initio vitiosum est, non potest tractu temporis convalescere*, says *Pomponius*. Time shall never sanctify a fraud; and it is clear that where an *express* trust is once clearly established, no time shall operate as a bar in favour of the Trustees against the *Cestui qui trust*. Thus in *Trevelyan v. L'Estrange*,<sup>(r)</sup> Sir C. Pepys (Lord Cottenham) set aside a purchase by a steward at an undervalue, after a lapse of 40 years. But notwithstanding, where the act is in itself merely *voidable*, and not void, or where it turns upon undue advantage, surprise, or imposition, there the party imposed upon may upon deliberation and with a full knowledge of all the circumstances, elect to confirm it. So in *Murray v. Palmer*, Lord Redesdale says that no act will confirm a fraud, *unless* the person knew the fraud, and intended to confirm it by the act. So in *Montmorency v. Devereux*,<sup>(s)</sup> Lord Cottenham said—

“Is the transaction actually void in itself? If so, there can be no confirmation of a transaction actually void in itself. But a transaction, voidable only from circumstances, however strong, may undoubtedly be confirmed by a subsequent deliberate act of the party who might originally, probably, have succeeded in declaring it void, and the following rules deduced from the cases of confirmation, acquiescence or release of breaches of trust may be usefully borne in mind with reference to the conduct of all parties in a fiduciary relation, and also as to the degree of knowledge which is necessary to render valid acts done through ignorance, mistake, &c. ‘1st. As in the case of concurrence, the *cestui que trust* must be *sui juris*, and not a feme covert or infant.’ ‘And in the case of infants, the Court continues its protection even after they have attained twenty-one till such time as they have acquired all proper information.

“The *cestui que trust* must be fully conversant of all the facts and circumstances of the case.

“The *cestui que trust* must not only be made acquainted with the facts, but be also apprised of the Law, or how those facts would be dealt with if brought before a Court of Equity.

“The release must not be wrung from the *cestui que trust* by distress or terror.”

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(r) Sch. and Lef. 487.

(s) 7 Clk. and F.

§ 63. The next branch of constructive frauds arises from the fiduciary relation of the parties. On this subject much has already been said, while treating of mistake and misrepresentation.

"In this class of cases," writes *Story*, "there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which Courts of Equity act in regard thereto, stands, independent of such ingredients, upon a motive of general public policy; and it is designed in some degree as a protection to the parties against the effects of overweening confidence, and self-delusion, and the infirmities of hasty and precipitate judgment. These Courts will, therefore, often interfere in such cases, where, but for such a peculiar relation, they would either abstain wholly from granting relief, or grant it in a very modified and abstemious manner."

§ 64. Though Courts will not sit to enforce all the obligations of strict morality, yet wherever confidence has been reposed it must be respected.

"If confidence is reposed," writes *Story*, "it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of Equity will not, therefore, arrest, or set aside, an act or contract, merely because a man of more honour would not have entered into it. There must be some relation between the parties, which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But when such a relation does exist, Courts of Equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance; for it is founded in a breach of confidence. The general principle which governs in all cases of this sort, is that, if a confidence is reposed, and that confidence is abused, Courts of Equity will grant relief."

§ 65. The most obvious of these relations is that of parent and child, but it is unnecessary to add to what has already been said on that point.

§ 66. The next is that of Trustee and *Cestui qui trust*; all persons who undertake any office of confidence towards another are

in the eye of Equity Trustees; the term is by no means confined to the narrow legal acceptance in which one person is *expressly* appointed "Trustee" for a particular object, person, or estate. Perhaps the most ordinary relation of this description is that of Attorney and Client.

"The situation of an attorney, or solicitor," writes *Story*, "puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence the Law, with a wise Providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which, between other persons, would be held unobjectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to Judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties. By establishing the principle, that while the relation of client and attorney subsists in its full vigour, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former; it supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case; a task, often difficult, and ill-supported by evidence, which can be drawn from satisfactory sources."

The onus of proving any purchase from a client perfectly fair is cast upon the attorney; it is not necessary for the client to show that it is unfair; *primâ facie* the transaction smacks of fraud, and the party on whom the suspicion falls must rebut it. The observations of Lord *Brougham* in *Hunter v. Atkins*<sup>(f)</sup> put the doctrine in a very forcible light. He says—

"There is no dispute upon the rules which, generally speaking regulate cases of this description. Mr. Alderman *Atkins* is either to be regarded in the light of an agent confidentially intrusted with the management of Admiral *Hunter's* concerns, a person at least in whom he reposed a very special confidence, or he is not. If he is not to be so regarded, then a deed of gift, or other disposition of property in his favour, must stand good, unless some direct fraud were practised upon the maker of it; unless some fraud, either by misrepresentation or by suppression of facts, misled him, or he was of unsound mind when the deed was made. If the Alderman did stand in a confidential relation towards him, then

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(f) 3. M. and K. 11.

the party seeking to set aside the deed may not be called upon to show direct fraud, but he must satisfy the Court by the circumstances that some advantage was taken of the confidential relation in which the Alderman stood. If the Alderman stood towards the Admiral in any of the known relations of guardian and ward, attorney and client, trustee and *cestui que trust*, &c., then, in order to support the deed he ought to show, that no such advantage was taken, that all was fair, that he received the bounty freely and knowingly on the giver's part, and as a stranger might have done. For I take the rule to be this ; there are certain relations known to the Law, as attorney, guardian, trustee ; if a person, standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing every thing to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefitted ; and he may fairly and wisely desire to benefit him by a gift, or, without such an intention being the predominating motive, he may wish to give him the advantage a sale or a lease. No Law that is tolerable among civilised men, men who have the benefits of civility without the evils of excessive refinement and over-done subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas, in the case of a stranger, it would lie on those who opposed him) to show that he has placed himself in position of a stranger, that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened, which might not have happened, had no such connection subsisted. The authorities mean nothing else than this, when they say, as in *Gibson v. Jeyes* that attorney and client, trustee and *cestui que trust* may deal, but that it must be at arm's length, the parties putting themselves in the situation of purchasers

and vendors, and performing (as the Court said, and, I take leave to observe, not very felicitously or even very correctly) all the duties of those characters. The authorities mean no more, taken fairly and candidly towards the Court, when they say, as in *Wright v. Proud* (6), that an attorney shall not take a gift from his client, while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature; a dictum reduced in *Hatch v. Hatch* to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of showing that every thing was voluntary and fair, and with full warning and perfect knowledge; for in *Harris v. Tremenhore* the Court only held that in such a case a suspicion attaches on the transaction, and calls for minute examination."

And in *Bulkeley v. Wilford*,<sup>(\*)</sup> Lord Eldon said—

"Whether you meant fraud, whether you knew you were the heir at Law of the testator or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have been entitled to it if you had known what as an attorney you ought to have known, and, not knowing it, you shall not take advantage of your own ignorance. It is too dangerous to the interests of mankind, that those who are bound to advise, and who, being bound to advise, ought to be able to give sound and sufficient advice, to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others."

§ 67. So promises made to Vakeels, *pendente lite*, beyond their legal remuneration, are not enforceable at Law.

§ 68. In the relation of principal and agent, the agent shall derive no advantage beyond that stipulated for: for the principal pays, the agent for his whole time, his whole labour, and his whole skill. Thus the auctioneer cannot purchase for himself the property which he is employed to sell. Where such sale is upheld, the utmost good faith must be proved. On this ground stands the invalidity of a promise made by the captain of a ship, during a storm, of extra wages and the like, to the sailors, if they will use *extra exertions*; for there is no consideration for such a promise. All their strength, and all their courage, is already their employers.

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(\*) 2 Clk. and Fin: 177.



§ 69. Still more closely will Equity watch transactions between guardian and ward; for here the party *in loco parentis* may obtain a parent's influence without feeling a parent's affection: and the time to which this relationship extends is construed in Equity not to end with the actual coming of age of the ward, but until all accounts are settled, and the estate is entirely out of the guardian's controul. Thus a purchase made by a guardian of his ward's estate immediately on his coming of age, may be set aside; <sup>(\*)</sup> and if he buys up incumbrances on his ward's estate, he shall be but a trustee, and if he has purchased at an under-value, can only charge him with what he has actually paid.

"Where" says Lord Hardwick in *Hyllon v. Hyllon*, <sup>(\*)</sup> "a man acts as guardian, or trustee, in nature of a guardian for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward's coming of age, and at the time of settling accounts, or delivering up the trust; because an undue advantage may be taken. It would give an opportunity, either by flattery, or force, by good usage unfairly meant, or by bad usage imposed, to take such an advantage. And therefore the principle of the Court is of the same nature with relief in this Court on the head of public utility; as in bonds obtained from young heirs; and rewards given to an attorney pending a cause; and marriage brokerage bonds. All depends upon public utility; and therefore the Court will not suffer it, though, perhaps, in a particular instance there may not be any actual unfairness."

And in *Hatch v. Hatch*, <sup>(x)</sup> Lord Eldon said—

"There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than, if a trustee, having done his duty, the *cestui que* trust, taking into his fair, serious, and well informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given: and recollecting, that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced that inquiry is so easily baffled in a Court of Justice; that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression, and the difficulty of getting property out of the hands of the guardian or trustee thus increased. And, therefore, if the Court does not watch these transactions with a jealousy al-

(\*) Sug. V. and P. 13 Edn: p. 596.

(\*) 7 Ves. 540.

(x) 2 Ves. 297.

most invincible, in a great majority of cases, it will lend its assistance to fraud, where the connection is not dissolved, the account not settled, every thing remaining pressing upon the mind of the property under the care of the guardian or trustee."

§ 70. Where the relation of *Trustee* in its more technical sense exists, much the same rules exist as in respect to guardian and ward. A *cestui que trust* may always at his own option set aside a sale to his trustee, even though made at public auction, and whether *bonâ fide* or not.

§ 71. One very common relation in every day life is that of principal and surety: so important, that I propose to consider it hereafter separately. Here it will suffice to say that *uberrima fides* is expected, and any concealment of a material fact, which, if known, might leave influenced the surety in taking upon himself the liability, will annul the contract; so also will any subsequent variation or departure from the terms of the contract originally entered into, without the knowledge and consent of the surety, who may fairly say *non hæc in fœdera veni*. See *Pooley v. Harmond*.(y)

§ 72. The last branch of constructive frauds is where the fraud affects the interests of *third* parties.

"And here the general rule is," writes *Storey*, "that particular persons in contracts and other acts shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect to other persons, who stand in such a relation to either, as to be affected by the contract, or the consequences of it. And as the rest of mankind, besides the parties contracting, are concerned, the rule is properly said to be governed by public utility."

§ 73. Thus in the case of catching bargains with expectant reversioners or remainder men, during the life time of the ancestor.

"In most of these cases have concurred deceit and illusion on other persons, not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor, who

has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand."

§ 74. The bargain must have been made under pressure; and it seems almost superfluous to add, that it must be without the knowledge and consent of the parent. Otherwise such party could not complain of fraud; nay, he might lie by, and enable the improvident son to prey upon the world; a power being reserved for the contract being rescinded after the proceeds had been squandered. The judgment of Lord *Brougham* in *King v. Hamlet* is very forcible. That was a loan<sup>(2)</sup> under mask of trading. He said—

"I take to be incontestable as applicable to the doctrines of this Court upon the subject of an expectant heir dealing with his expectancy, and as governing more especially the present question, First, that the extraordinary protection given in the general case must be withdrawn, if it shall appear, that the transaction was known to the father or other person standing in *loco parentis*—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even although such parent or other person took no active part in the negotiation; provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it, so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies upon him of showing, that he did so under the continuing pressure of the same distress which gave right to the original dealing. Still more fatal to his claim of relief will it be, if the father, or person in *loco parentis*, shall be found to have concurred in this adoption of the repudiated contract. Either of these propositions would be decisive of the present question, if they are well founded in Law, and if the facts allow of their application to it. I shall examine each of them in both respects. The whole doctrine with respect to an expectant heir assumes, that the one party is defenceless, and exposed, unprotected, to the demands of the other, under the pressure of neces-

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(2) See however the reasoning of Lord *Brougham* which was affirmed in the House of Lords (3. Clk. and Fen. 218) questioned by Lord *St. Leonard's Vendors and Purchasers*, 13 Ed.: p. 316. and See *Syden* on House of Lords, Jurisdiction, p. 68. "The first of these rules, he observes, is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained: the knowledge of the parent may, under some circumstances, remove one of the objections to such a transaction."

sity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered; and then only stand forward to aid him in rescinding engagements, which he had allowed him to make and to profit by. If all the cases be examined from the time of Lord *Nottingham* downwards, no trace will be found in any one of them of the father's or other ancestor's privity. On the contrary, wherever the subject is touched upon, his ignorance is always assumed as part of the case; and its being so seldom mentioned either way shows clearly, that the privity of the father or ancestor never was contemplated. It is, however, several times adverted to in a manner demonstrative of the principle. In *Cole v. Gibbons*,<sup>(a)</sup> the ground of this whole Equity is said to be the policy of the Law to prevent the heir being seduced from a dependence upon the ancestor, who probably would have relieved him. In the same spirit Lord *Comper*, in *Twisleton v. Griffith*,<sup>(b)</sup> had before stated as one effect of the Law, its tendency, by cutting off relief at the hands of strangers, to make the heir disclose his difficulties at home. So in the *Earl of Chesterfield v. Janssen*,<sup>(c)</sup> Mr. Justice *Burnett* treats such transactions as things done behind the father's back, and, as it were, a fraud upon him; a view of the subject also adopted by Lord *Hardwicke* in the same case.<sup>(d)</sup> It is as well to mention these cases, because there has been no decision upon the point; but it is quite a clear one, and only new, because the facts never afforded a case for decision, the proposition having, apparently, never been questioned."

And in *Boynton v. Hubbard*,<sup>(e)</sup> the American C. J. *Parsons* thus clearly expounds the Law:—

"Another case is, where the deceit is upon persons not parties to the contract, as a deceit on a father or other relation, to whom the affairs of heir or expectant are not disclosed; so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers, in fact, although not in form. This deceit is relieved against as a public mischief, destructive of all well-regulated authority or controul of persons over their children, or others having expectations from them; and as encouraging extravagance, prodigality, and vice. From the forms of proceeding in Courts

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(a) 3. P. Wms. 290.

(c) 1. Atk. 339.

(b) 1. P. Wms. 310.

(d) 1. Atk. 333, 334.

(e) 7 Mars. R. 112.

of Equity; it must be admitted that these principles may often be more correctly applied there than in Courts of Law. Chancery may compel a discovery of facts, which a Court of Law cannot; and from facts disclosed, a Chancellor, as a Judge of facts, may infer other facts, whence deceit, public or private, may be irresistably presumed. Whereas at Law fraud cannot be presumed, but must be admitted or proved to a Jury. But when a Court of Law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief should not be obtained there, although not always in the same way in which it may be obtained in Equity. A case in which an heir or expectant is frequently relieved against his own contract is a *post obit* bond. This is an agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, on the death of the person from whom he has some expectation, if the obligor be then living. This contract is not considered as a nullity, but it may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. But whenever an advantage is taken of the necessity of the obligor to induce him to make this contract, he is relieved, as against an unconscionable bargain, on payment of the principal and interest. This contract may be made on data, whence its reasonableness may be ascertained; for the lives of the obligor, and of the person on whose death the payment is to be made are subject to be valued, as is done in insurance upon lives. But the covenant declared on in the case at bar is not in the nature of a *post obit* contract. Another case in which an heir is relieved, is when he is entitled to an estate in reversion or remainder, expectant on the death of some ancestor or relative, and he contracts to sell the same for present money. All these cases are not relieved against as fraudulent, because a reasonable and sufficient consideration may be paid, as ascertained by the annual value of the estate, and of the intervening life. But, as in *post obit* contracts, when an advantage is taken by the purchaser of the necessity of the seller, he will be relieved against, the sale on repaying the principal and interest, and sometimes paying for reasonable repairs made by the purchaser. This relief is granted on the ground that the contract of sale was unconscionable. In unconscionable *post obit* contracts, Courts of Law may, when they appear, in a suit commenced upon them, to have been against conscience, give a relief by directing a recovery of so much money only as shall be equal to the principal received and the interest. But in sales of remainders and reversions, by grants executed, I know of no relief that Courts of Law can give, unless the grants shall appear to have been fraudulently obtained of the grantor; in which case the fraud will vitiate and render

null the grants so inflicted. The contract before us is not a sale of a remainder or reversion; but is different from any noticed in the reports, that have been cited. There is one case of a contract between presumptive heirs, respecting their expectancies from the same ancestor. It is the case of *Buckley v. Newland*. The parties had married two sisters, presumptive heirs of Mr. Turgis. The husbands agreed, that whatever should be given by Mr. Turgis should be equally divided between them. After Turgis's death, the defendant, who had the greater part given to him, was compelled to execute the agreement. The reciprocal benefit of the chance was a sufficient consideration. The tendency of the agreement was to guard against undue influence over the testator; and it could not be unreasonable to covenant, to do what the Law would have done, if Turgis had died intestate. The covenant declared on in the case at bar is an agreement by an heir, having two ancestors then living, an uncle and an aunt, that if he survived them, or either of them, he will convey to a stranger one third part of all the estate, real and personal, which shall come to him from those ancestors, or either of them, by descent, distribution, or devise. And it is found by the Jury, that this contract was not obtained from the heir by the fraud of the purchaser. If therefore, this covenant is void, it must be on the principle, that it is a fraud, not on either of the parties, for that the jury have negatived, but on third persons not parties to it, productive of public mischief, and against sound public policy. If the contract has this effect it is apparent to the Court from the record; the whole contract being a part of the record. And that a contract of this nature has this effect, we cannot doubt.

"The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the Law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff is to substitute him, as a co-heir, with himself to his uncle's estate. The uncle is thus made to leave a portion of his estate to *Boynston*, a stranger, without his knowledge, and consequently without any such intention. This Lord *Hardwicke* calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice; and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may

go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the Law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens."

§ 75. In all this jurisdiction Equity has probably got its doctrines from the *Macedonian Law*. Lord *Hardwicke* points to the *Macedonian Decree* in the case of *Chesterfield v. Janssen*. The words of it are—

"*Verba Senatusconsulti Macedoniani hæc sunt, &c. Placere, ne cui, qui filiofamilias mutuum pecuniam dedisset, etiam post mortem parentis ejus, ejus in potestate fuisset, actio petitioque daretur; ut scirent, qui pessimo exemplo faverent, nullius posse filiofamilias bonum nomen, expectata patris morte, fieri.*"

§ 76. Long acquiescence or actual confirmation of the transaction by the party entitled to relief will destroy the Equity to relief; for this species of contract is one of those capable of confirmation; not like marriage brokerage contracts and others, which are incapable of being confirmed, as against public policy.

§ 77. Agreements between parties which operate directly or virtually to delay, defraud, or deceive creditors, are constructive frauds upon creditors. It is a fundamental principle with civilized nations to protect the right of creditors. In this country it is only the too common practise to mask and conceal property for this purpose, by purchasing in what are called "*Bynamee*," and by partitions, mortgages, and other incumbrances, and resales, by which the execution creditor is held at arms length for a length of time, has to institute fresh expensive litigation, or is altogether robbed of the fruits of his judgment, the *finis, fructus, et effectus legis*. So in *Blenkinsop v. Blenkinsop*.<sup>(f)</sup>

"In the Civil Law it was declared, that whatever was done by debtors to defeat their creditors, whether by alienation or other disposition of their property, should be revoked, or null as the case might require. *At Prætor. Quæ fraudatious causæ gesta erunt, cum eo, qui fraudem non ignoraverit; de his curatori bonorum, vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo. Necessario prætor hoc edictum proposuit; quo edicto consuluit creditoribus, revocando ea, quæcum-*

(f) 12 Bea. 568.

*que in fraudem eorum alienata sunt ! At ergo Prætor ; Quæ fraudationis causâ gesta erunt. Hæc verba generalia sunt, et continent in se omnem omnino in fraudem factam, vel alienationem vel quemcunque contractum. Quodcunque igitur fraudis causâ factum est, videtur his verbis revocari qualecunque fuerit. Nam, late ista verba patent, sive ergo rem alienavit, sive acceptilatione vel pacto aliquem liberavit. Idem erit probandum. Et si pignora liberet, vel quem alium in fraudem creditorum præponat. And the rule was not only applied to alienations, but to fraudulent debts, and, indeed to every species of transaction or omission prejudicial to creditors. Vel ei præbuit exceptionem, sive se obligavit fraudandorum creditorum causâ, sive numeravit pecuniam, vel quodcunque aliud fecit in fraudem creditorum ; palam est edictum edictum locum habere, &c. Et qui aliquid fecit, ut desinat habere, quod habet, ad hoc edictum pertinet. In fraudem facere videri etiam eum qui non facit, quod debet facere, intelligendum est ; id est, si non utitur servitutibus."*

§ 78. And the like rule was applied to purchases for a valuable consideration with notice.

*"Quæ fraudationis causâ gesta erunt, cum eo qui fraudem non ignoraverit de his, &c. actionem dabo. Si debitor in fraudem creditorum minore pretio fundum scienti emptori vendiderit ; deinde hi, quibus de revocando eo actio datur, cum petant ; quæsitum est, an præteritum restituere debent ? Proculus existimat omnimodi restituendum esse fundum, etiamsi pretium non solvatur ; et rescriptum est secundum Proculi sententiam."*

§ 79. The principles of our Common Law were the same ; and in the reign of Elizabeth, Statutes were passed against fraudulent conveyances to defeat creditors,<sup>(g)</sup> and the like to defraud purchasers.<sup>(h)</sup> The Leading case upon these is *Twyne's case*, with which Mr. *Smyth* opens his invaluable work. Thither the curious must be referred.

§ 80. In each case as it arises, the Court will have to say whether the conveyance is fraudulent or not. One strong test is whether the vendee, &c. is put in possession, or whether the vendor still remains in possession, or retains a joint possession with the vendee. But of course when from the terms of the transaction the owner is to retain possession until default made, this inference does not arise. Such for instance is the ordinary case of mortgage. Where possession is impossible, as the delivery of a ship at sea, a symbolical delivery suffices.

(g) 13 Eliz. C. 5.

(h) 17 Eliz. C. 4.



§ 81. There is a distinction between the two Statutes—

“By the 27th Eliz. every voluntary conveyance is rendered void by a subsequent purchase for valuable consideration; whilst under the 13th Eliz. a voluntary conveyance by one not indebted at the time, (more especially if for a child of the grantor,) if no particular evidence or badge of fraud appears, will be good as against subsequent creditors.”

§ 82. Of course where there is a *deceit* or fraud the acts is void; but the Statutes are pointed against those acts which parties are constantly doing under pretence, perhaps under the impression, that they are discharging a moral obligation, such as making provision for wives, children, and other relations.

§ 83. But we must be just before we are generous. There is nothing to prevent our generosity where it is compatible with justice.

“The statute, while it seems to protect the legal rights of creditors against the frauds of their debtors, anxiously excepts from such imputation the *bonâ fide* discharge of moral duties. It does not, therefore, declare all voluntary conveyances to be void; but only all fraudulent conveyances to be void. And, whether of conveyance before or after, is declared to depend upon its being made ‘upon good consideration, and *bonâ fide*.’ It is not sufficient, that it be upon good consideration, or *bonâ fide*. It must be both. And, therefore, if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives; yet it is utterly void as to creditors.”

§ 84. It is necessary to consider briefly here the doctrine of *voluntary* conveyances; and to the proper understanding of this, in the first place, as to consideration, which says *Blackstone*<sup>(i)</sup> may be *good* or it may be *valuable*; “a *good* consideration is such as that of blood, or of *natural* love or affection,” and, is founded on motives of generous prudence and natural duty. A *valuable* consideration is such as *money* or *marriage* or the like, which the Law esteems an equivalent given for the grant. The Roman Law drew this distinction.

§ 85. The distinction is important, because a deed made on only a *good* consideration, and a child's portion without any consideration

at all, is called a *voluntary* deed; and is void as against subsequent purchasers; and, when executed by an insolvent party, against creditors. It requires a *valuable* consideration to support such deeds.

§ 86. If a man is not indebted at the time of making the grant, or indebted but a trifle in comparison with the amount of his estate, the fact of his *subsequently* becoming insolvent will not affect such conveyance, assuming of course that there is no element of fraud in the transaction.

"It has been justly remarked that the distinction between cases where the party is indebted, and those where he is not indebted, is drawn from considerations too obvious to require illustration from cases. For if a man indebted were allowed to divest himself of his property in favour of his wife or his children, his creditors would be defrauded. But if a man not indebted, and not meaning to commit a fraud, could not make an affective settlement in favour of such objects, because by possibility he might afterwards become indebted, it would destroy those family provisions which are, under certain restrictions, a benefit to the public, as well as to the individual object of them."

§ 87. A voluntary settlement will however only be defeated by a conveyance for value to the extent necessary to give the effect to the conveyance for value.<sup>(k)</sup>

§ 88. Subsequent creditors have no Equity through the rights of creditors anterior to and existing at the date of a voluntary conveyance, when such conveyance is of the character described above; that is to say, made by a man only moderately indebted the time of the conveyance. So in *Kidney v. Coussmaker*,<sup>(l)</sup> Sir *W. Grant* said—

"Though there has been much controversy, and a variety of decision, upon the question, whether such a settlement is fraudulent as to any creditors, except such as were creditors at the time, I am disposed to follow the latest decision, that of *Montague v. Lord Sandwich*; which is, that the settlement is fraudulent only as against such creditors as were creditors at the time."

§ 89. Where the question is whether a party has made a "fraudulent preference" under the Bankrupt or Insolvent Law, the following rules will enable the Court to decide:—

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(k) *Croker v. Martin*, 1. Bligh. n. s. 578.

(l) 12. Ves. 136-155.

"1st. Any transfer which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent, and an act of bankruptcy, under the Bankrupt Act; (and void as against the Assignees) upon an Insolvency, *Dædem Grimsby v. Ball*.<sup>(m)</sup>

"2nd. Any conveyance to a creditor by a trader, of his whole property, or of the whole with an exception merely nominal, in consideration of a by-gone and pre-existing debt, though not fraudulent within the statute of Elizabeth is fraudulent under the Bankrupt Act, and an Act of Bankruptcy. *Lindon v. Sharp*.<sup>(n)</sup> *Graham v. Chapman*.<sup>(o)</sup> *Hutton v. Cruttwell*.<sup>(p)</sup> *Young v. Waud*.<sup>(q)</sup> *Smith v. Cannon*.<sup>(r)</sup> The note to *Graham v. Chapman*,<sup>(o)</sup> as to the date of the introduction of this rule into the Bankrupt Law is erroneous, *Law v. Skinner*<sup>(s)</sup> having been decided in 15 Geo. III., (not 15 Geo. II., as there incorrectly stated), upon the authority of *Worsely v. DeMattos*,<sup>(u)</sup> decided in 31 Geo. II.

"3. A transfer by a trader of part of his property to a creditor, in consideration of a by-gone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent, and an act of bankruptcy under the Bankrupt Act, if made voluntarily, and in contemplation of bankruptcy."

§ 90. Another class of constructive frauds upon creditors arises where some of the creditors have entered into secret composition deeds with the debtor upon his coming insolvency, whereby they obtain undue advantages as against the general body of creditors. All compositions in such cases are supposed to be founded upon entire good faith and mutual confidence. See *Mare v. Sandford*.<sup>(v)</sup>

"The purport of a composition or trust deed, in cases of insolvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors, according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors, who become parties, generally agree to release all their debts beyond what the funds will satisfy. Now, it is obvious, that in all transactions of this sort the utmost good faith is required; and the very circumstance that other creditors of known reputation and standing have already become parties to the deed, will operate as a strong inducement to others to act in the same way. But if the signatures of such prior creditors have been procured

(m) 11. M. and W. 531.

(n) 7. Scott, N. R. 730; 6 Man. and Gr. 895, S. C.

(o) 12 C. B. 85.

(p) 1 E. and B. 15.

(q) 8 Exch. 221.

(r) 2 E. and B. 36.

(s) 12 C. B. 94 (a.)

(t) 2 W. BL. 996.

(u) 1 Burr. 487.

(v) 5 Jur. n. s. 1339.

by secret arrangements with them, more favourable to them than the general terms of the composition deed warrant, those creditors really act, as has been said by a very significant, though homely figure, as decoy ducks upon the rest. They hold out false colours to draw in others, to their loss or ruin."

§ 91. And it matters not whether the debtor has been a voluntary party to the fraud, or been induced to enter into it by the threats or the like; for the relief is granted, not on account of the debtor, but of the unsuspecting body of creditors at large; on account of public policy, such composition deeds and trusts are utterly void *ab initio*, and money paid under them may be recovered back.

§ 92. Where executors or administrators are colluding with the debtors of the estate, either to retain or waste the assets, the creditors may sue the debtor at once, making the executor or administrator a party; for here the very person whose duty it is to protect the estate, is destroying it; and though ordinarily an executor only can sue for the debts of the deceased, yet, *cessante ratione*, there is here abundant reason for departure from the general rule.

§ 93. This subject cannot be quitted without a few words upon the subject of the liability of parties, dealing fraudulently with their trust funds or property, to pay interest or account for profits. This, it will be seen falls somewhat under the head of Damages, but it has been reserved as most conveniently to be discussed here.

Courts of Equity have no doubt a jurisdiction to give damages: *Prothero v. Phelps*.<sup>(\*)</sup>

But it is as an aid to specific performance, and awarded as a compensation: not as a substantive object of their interference, as in Courts of Law. Where the legal estate is in the Defendant, a Court of Equity will not give relief to a *complainant* who has made improvements. The Hindu Law is different, and allows a mortgagee or other party in possession of the land to claim what he has laid out in improvements. But in cases of fraud, actual or constructive, Courts of Equity give damages as a substantive relief. Thus they will decree an account of rents and profits from the time of his title to an account, whenever the plaintiff has been kept out of his estate by the fraud, misrepresentation, or concealment of the

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(\*) 20 Jur. 173.

Defendant. The doctrine of the Roman Law as laid down by *Papinian* is, *Generaliter cum de fraude disputatur, non quid habeat actor, sed quid per adversarium habere non potuit, considerandum est.*

§ 94. Where a Trustee, say an Executor, has been guilty of laches in accounting for the estate, payment of legacies, or the like, he will be charged with 5 per cent. interest on the balance in his hand. In this country he should be subject to a higher rate of interest.

It will be no excuse that he did not ~~use~~ the money. He was bound to disburse it, or to render it productive.

§ 95. Where the Trustee has actually made more, he shall pay more, for he is compellable to account for every rupee he has actually received. See *Tibb v. Carpenter*,<sup>(x)</sup> per Sir J. Plumer.

§ 96. Where a Trustee employs trust funds in his own trade or business, whether he keep them separate from, or mix them with his own, the *Cestui qui trust* may have an account of the profits made by, instead of the interest on the amount of, the trust funds so employed. Thus in the leading case of *Docker v. Somes*,<sup>(y)</sup> Lord Brougham said—

“Wherever a trustee, or one standing in the relation of a trustee, violates his duty and deals with the trust estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain which he has made. Thus, if trust money is laid out in laying and selling land, and a profit made by the transaction, that shall go, not to the trustee who has so applied the money, but to the *cestui que trust* whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss (if any) must fall upon himself, yet, for every farthing of profit he may make, he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear, that he must account for the profit received by the adventure, or from the concern. In all these cases it is easy to tell what the gains are. The fund is kept distinct from the trustee's other monies, and whatever he gets, he must—

(x) 1 Mad. 304.

(y) 2 M. and K. 655.

account for and pay over. "It is so much fruit, so much increase on the estate for chattel of another, and must then follow the ownership of the property and go to the proprietor.

"Such being the undeniable principle of Equity, such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains and thus frustrating the intentions that caused it—punished by charging all losses on the wrong-doer, while no profit can ever accrue to him—can the Court consistently draw the line, as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent—those instances where the trustee is most likely to misappropriate, namely, those in which he uses the trust funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the Court could ever, even in appearance, countenance such an anomaly. The reason which has induced Judges to be satisfied with allowing interest only, I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult where a great proportion of the gains proceeded from skill or labour employed upon the capital. In cases of separate appropriation, there was no such difficulty, as where land or stock had been bought and then sold again at a profit, and here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in serving the profits, which might be supposed to come from the money misapplied, from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course; and, instead of endeavouring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits and to assign that to the trust estate.

"This principle is undoubtedly attended with one advantage—it avoids the necessity of an investigation, of more or less nicety, in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation—all profit equally whatever may be the real gain derived by the trustee from his breach of duty; nor can any amount of profit made be reached by the Court, or even the most moderate rate of mercantile profit—that is, the legal rate of interest—be exceeded,

whatever the actual gains may have been, 'unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest, and this without the least regard to the profits actually realised ; for in the most remarkable case in which this method has been resorted to<sup>(s)</sup> the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it.

"But the principal objection which I have to the rule, is founded upon its tendency to cripple the just power of this Court in by far the most wholesome and indeed necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversation that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the Courts arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralysed or shrunk up. The distinction,—I will not say sanctioned, but pointed at by the negative authority of the cases,—proclaims to executors and trustees, that they have only to invest the trust money in the speculations and expose it to the hazards of their own commerce, and be charged £5 per cent. on it, and then they may pocket £15 or £20 per cent. by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication, is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction.

"Even if cases were more likely to occur than I can think they are, of inextricable difficulties in pursuing such inquiries, I should still deem this lesser evil by far, and be prepared to embrace it.

"Mr. *Solicitor General* put a case of a very plausible aspect, with a view of deterring the Court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with £100 of trust money, and earning £1000 a year by selling them to his patients and so he might have taken the case of trust money laid out in purchasing a piece of steel, or skein of silk, and these being worked up into goods of the finest fabric. Birmingham trinkets, or Brussels lace, where the work exceeds by 10,000 times the

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(s) *Raphael v. Boehm* stated in 2 Ves. 92, and 1 Madd. 300; which indeed is always cited to be doubted, if not disapproved.

material in value. But such instances in truth prove nothing ; for they are cases not of profits upon stock, but of skilful labour very highly paid ; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit ; although the refinements of the Civil Law would certainly bear us out, even in charging all gains accruing upon those goods, as in the nature of accretion belonging to the true owners of the chattels.

"The last person who can be heard to argue from the difficulty of tracing or apportioning the profits of the misapplied fund, is the man whose breach of trust has caused the misapplication, and created the difficulty.

"When did a Court of Justice, whether administered according to the rules of Equity or of Law, ever listen to a wrong doer's argument to stay the arm of Justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being traced ? Rather, let me ask, when did any wrong doer ever yet possess the hardihood to plead, in mid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, You had better not make the attempt for you find I have made the search very troublesome ? The answer is, The Court will try."

§ 97. Should the difficulty suggested arise, that may be a reason to induce the Court to give £5 per cent. with annual rests, or in other words, compound interest. See *James v. Foxall*<sup>(a)</sup> ; and the trustee will be charged with the same interest if he pays the fund into his own account at his bankers, though he does not actually employ any part of it in his trade. See *Williams v. Powell*.<sup>(b)</sup>

§ 98. With respect to the general question of charging executors with interest, says Sir *Anthony Hart* in *Flanagan v. Nolan* :

"There are two things to be kept in view, first, we are not to look so closely into the dates of a running account to calculate interest upon it, as to deter respectable men from undertaking the office of executor ; and on the other hand we are not loosely to permit any man, however respectable, to retain the money of others in his hands without making it productive. An executor's duty in this respect is to deal with the trust estate as a provident man would deal with his own, and

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(a) 15 Bea. 392.

(b) 15 Bea. 461.



every provident person makes interest of his money, when he has got together a sum which he thinks to be worth while to lay out at interest."

§ 99. Where funds have never come to hand but have been inexcusably left outstanding, it seems that Equity will only charge the Trustee with the principal.

§ 100. It is a very common practice to charge in the pleadings fraud which cannot be substantiated at the hearing, and is sometimes the mere creature of the pleader's imagination. In Equity, fraud of itself gives jurisdiction, and in former days in England charges of fraud were habitually inserted in a Bill, expressly for the purpose of avoiding a demurrer. I have heard of an Equity Draftsman ordering one of his pupils to take back a Draft Bill and "spice it well with fraud." But it is obvious that this is a most improper practice. The *facts* of the case and nothing more should be stated, and it is monstrous to make the records of a Court of Justice the vehicle of publishing perfectly unfounded charges against the character of any man. Accordingly of late years the Courts have unmistakeably marked their sense of this mal-practice, by refusing costs, or awarding them to the other side, or by dismissing the Bill where the fraud alleged is not proved.

Thus in *Wilde v. Gibson*,<sup>(c)</sup> it was laid down broadly, that where a party grounds his claim to relief on the ground of fraud and fails to prove it, he will not be entitled to any other relief on any other ground of Equity which he may establish.

But this case has been somewhat qualified by later decisions. In *Watson v. Mayson*,<sup>(d)</sup> it was held that fraud must be the foundation of the relief prayed for, and that an unfounded statement of circumstances amounting to fraud, without an express charge of fraud against the Defendant, would not bar the Plaintiff.

In *Espey v. Lake*,<sup>(e)</sup> it was held that it is not because there are in a Bill allegations of fraud *superadded upon circumstances which constitute a sufficient original Equity*, that therefore the original Equity is not to be attended to.

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(c) 12 Jur. 527 and see *Price v. Berrington*. 15 Jur. 990, and *Glascott v. Lang*. 2 Phill. 310.

(d) 14 Jur. 341.

(e) 16 Jur. 1106.

And in *Parr v. Jewell*,<sup>(f)</sup> it was decided that—

“If a case of fraud is made by a bill, and is not established by the evidence, and another case for relief is alleged in the same bill and proved, so much only of the bill as relates to the case of fraud is dismissed, and relief may be given upon the other part of it.

“But, if a case of actual fraud is alleged by the bill, the Plaintiff cannot obtain relief upon such a bill, by proving only a case of constructive fraud.”

And the Vice-Chancellor Sir Page Wood said—

“It is quite true, that, if charges of fraud are introduced into a bill in addition to a case claiming relief on other grounds, relief may be granted, although the case of fraud made by the bill may fail ; but, even if the Plaintiff could avail himself of that rule, I do not think that there is sufficient evidence to induce me now to give relief upon either of the cases here made.

“With respect to the question of fraud, and as to the dicta of Lord Cottenham in *Wilde v. Gibson*,<sup>(g)</sup> I may observe, first, that it is an error to suppose (and Lord Cottenham himself said he never intended it to be supposed) that if a charge of fraud is introduced into a bill which fails, and another case is also made by the bill which is established, the bill is to be dismissed because the charge of fraud fails ; but the true rule is, that so much of the bill is to be dismissed as relates to the charge of fraud, and relief may be given on the other part of the case which is established.”

Hence will be seen the danger, to say nothing of the gross impropriety, of bringing forward imputations of fraud which are not capable of being proved. The Plaintiff's entire case may be endangered by it, independently of the risk he runs of being deprived of, or visited with costs.

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(f) 1 K. and J. 671.

(g) 1 H. L. Cases 603.

## TOPIC THE EIGHTEENTH.

### NOTICE.

#### *Volenti non fit Injuria.*

§ 1. In one of the preceding disquisitions it was stated that where a party though ignorant of material facts, nevertheless had such notice of them as would put a prudent man on his guard, and ought to cause him to institute inquiry, he shall not be heard to allege his own ignorance to defeat or to resist the completion of his contract. For here, he had within his own power the means of knowledge, and whether he acted with express knowledge, or declined to inform himself, it is all one. He is voluntarily ignorant, and *Volenti non fit injuria*.

§ 2. It becomes necessary therefore to inquire into the doctrine of *Notice*. It may be laid down as a general rule, that a purchaser with notice of a right in another, is in Equity liable to the same extent, and in the same manner, as the person from whom he made the purchase.

§ 3. Thus an estate in the hands of a *subsequent* purchaser, or mortgagee, with notice of a prior defective mortgage, will be bound by it. So a purchaser with notice of a Trust shall be a Trustee in lieu of the Trustee from whom he purchased. So if A purchased an estate, knowing that B. had an equitable mortgage on it, or a lien for the paid purchase money, the Estate is still liable in his hands, and the incumbrancer may follow it. So in the Leading case of *Le Neve v. Le Neve*,<sup>(a)</sup> Lord *Hardwicke* laid it down—

“That the person who purchases an estate (although for valuable consideration) after notice of a prior equitable right, makes himself a *malâ fide* purchaser, and will not be enabled, by getting in the legal estate, to defeat such prior equitable interest, but will be held a trustee for the benefit of the person whose right he sought to defeat.”

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(a) An Equitable mortgage as distinguished from a legal mortgage is where no possession nor any formal conveyance is given, but a mere deposit of title deeds, accompanied, or not, by a memorandum of the purpose for which the deposit is made, takes place between the parties.

"If," says his Lordship, "a person does not stop his hand, but gets the legal estate, when he knew the right in Equity was in another, *machinatur ad subveniendum*; and it is a maxim in our law, that *fraus et dolus nemini patrocinari debent*. Fraud or *mala fides* therefore, is the true ground on which the Court is governed in cases of notice."

In accordance with this doctrine, our Registration Regulation XVII of 1802<sup>(b)</sup> provides that any purchaser, &c. with notice of existing incumbrance, or of previous sale unregistered, shall not effectuate his own conveyance by complying with the requisites of Registration.

§ 4. A *bona fide* purchaser for valuable consideration without notice is favoured in Equity<sup>(c)</sup> and where a *subsequent* purchaser *with* notice deals with such a one, he shall have the benefit of the first purchaser's want of notice; for otherwise such first purchaser could not deal with his property. So on the other hand, if a person with *notice* sells, the purchaser shall shelter himself behind his own want of notice. The case of *Harrison v. Forth*<sup>(d)</sup> aptly illustrates both branches of this rule.

"There A purchased an incumbrance, or that it was redeemable and then sold to B, who had no notice; who afterwards sold it to C, who had notice; the Master of the Rolls held, that the first notice to A, the first purchaser, was thereby revived, and that C, the last purchaser, should be liable to the incumbrance or redemption as if it had never been in the hands of one who had no notice; but afterwards, on appeal to Lord Keeper Somers, it being urged, that, in such case, an innocent purchaser without notice might be forced to keep his estate and could not sell it, and should be accountable for all the profits received *ab initio*, his Lordship held, that though A and C had notice, yet if B had no notice, the plaintiff could not be relieved against the defendant C. The doctrine laid down in this case has ever since been adhered to."

The Roman Law on this subject deserves to be studied.

"*At Prætor, Quæ fraudationis causâ gesta erunt, cum eo, qui fraudem non ignoraverit, actionem dabo.*"

Upon this there follows this comment.

"*Hoc Edictum eum coercet, qui sciens eum in fraudem creditorum hoc facere, suscepit, quod in fraudem creditorum fiebat. Quare, si quid in*

(b) Sec : VI. cl. 3.

(c) *Bassett v. Noseworthy*, Rep. Temp. Finch. 102, 2 Tud. and White L. C. p. 1.

(d) *Proc. Ch.* 51.

*fraudem creditorum factum sit, si tamen is, qui cepit, ignoravit, cessare videntur verba Edicti."*

And the very case is afterwards put, of a *bonâ fide* purchaser from a fraudulent grantee, the validity of whose purchase is unequivocally affirmed.

*Is, qui a debitore, cujus bona possessa sunt, quæsitum sit, an secundus emptor conveniri potest. Sed verior est Sabini sententia, bonâ fide emptorem non teneri, quia dolus ei duntaxat nocere debeat, qui, cum admisit, quemadmodum diximus, non teneri eum, si ab ipso debitore ignorantia emit. Is autem, qui dolo malo emit bonâ fide autem ementi vendidit, in solidum pretium rei, quod accepit tenebitur."*

§ 5. As to what constitutes Notice; of course where it is express but little need be said. Notice is rather *Actual* or *Constructive*.

§ 6. Of the former, it will suffice to say that a person is not bound to take notice of mere rumours from strangers, anonymous letters, and the like. The notice must proceed from some person interested in the property. Purchasers from Executors have no constructive notice of the peculiar trusts with which the property is affected. They may well presume that an Executor selling does so in order to discharge debts. But where the purchaser has notice that the Executor is turning the property into money for some illegal or fraudulent purpose, for instance to run away with it, he will be bound.

"On the death of the testator" writes Storey "the personal estate vests wholly in the Executor, and to enable him to execute the office with facility, the Law permits him, with or without the concurrence of any co-executor, to sell or even to mortgage, by actual assignment or by equitable deposit, all or any part of the assets, legal or equitable; and though liable to render an account to the Court, he cannot be interrupted in the discharge of his office by any person claiming either *dehors* the will or claiming under it. The creditor has merely a demand against the executor personally, the pecuniary or specific legatee is not entitled to the legacy or bequest until the executor has assented, and the residuary legatee has no lien until the estate has been liquidated and cleared of all liabilities, both out of and under the will. Upon the sale of the chattel, the purchaser is not concerned to see to the application of his purchase money: it need not be recited in the conveyance that the money was wanted for the discharge of liabilities: it

is sufficient that the purchaser trusts him whom the testator has trusted: if there be any misapplication, the remedy of the creditor or legatee is not against the purchaser, but the executor. It is impossible for the purchaser to ascertain the necessity of the sale, for this must depend upon the state of the accounts, which he has no means of investigating without the powers annexed only to the executorship. Even express notice of the will, and of the bequests contained in it, works the purchaser no prejudice; for 'every person,' said Sir *J. Leach*, who deals with an executor has necessarily implied if not express notice of the will: but all dispositions of personal property are by law subject to a prior charge for payment of debts: and as a purchaser of real estate, devised in aid for payment of debts, is not bound to inquire into the fact whether the sale is made necessary by the existence of debts, because he has no adequate means to prosecute such an inquiry, so he who deals for personal assets is, for the same reason, absolved from all inquiry with respect to debts: he has a right to assume that the executor sells in the necessary course of his administration; and it is upon this principle altogether indifferent what dispositions may be made in the will with respect to the personal property for which he deals; for whether it be specifically given or be part of the residuary estate, it is equally charged by law with the payment of debts."

§ 7. It is difficult to define constructive notice. Each case must be judged of by its particular circumstances. The Leading case on this doctrine is that of *Jones v. Smith*<sup>(c)</sup> where Vice-Chancellor *Wigram* has luminously discussed the question.

"It is scarcely possible," observes his honor "to declare *a priori* what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert, that cases in which constructive notice has been established resolve themselves into two classes: first, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected; and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and secondly, cases in which the Court has been satisfied, from the evidence before it, that

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(c) 1 Hare, 55 affd. by Ld. Lyndhurst, 1. Ph. 244.

the party charged had designedly abstained from inquiry for the very purpose of avoiding notice."

§ 8. Whatever is sufficient to put a person on inquiry, is sufficient notice; where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it.<sup>(f)</sup> And this is of great importance in dealings between Natives, where the property is masked by a "benamee" transaction, or is mortgaged by a usu-frutuary mortgage, or is in the possession of third parties on lease or Swamybhogum.<sup>(g)</sup> If a man at the time he purchases knows that the title deeds are not in possession of the Vendor, or that he is not in possession of the property, such purchaser is bound to take notice of the fact, and is bound by the consequences. He cannot purchase a larger estate or interest than the party with whom he deals has in himself to part with.

§ 9. Where a party, having his attention drawn to the absence of title deeds, neglects to make any inquiry respecting their absence, the Court will impute either fraud or gross and wilful negligence to him. But if he has inquired, and received a *reasonable* explanation, it will be otherwise.

§ 10. So where land is in possession of tenants, a purchaser is bound to notice their rights, and those rights must be respected by him. Thus in *Taylor v. Stobbert*,<sup>(h)</sup> Lord Rosslyn says—

"I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have. It has been determined that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire."

(f) See *Greenslade v. Dars*. 10 Jur. 295. *Owce v. Homan*, 17, Jur. 861. 17. Jur. pt. 2. p. 57.

(g) Rent-deed.

(h) 2 Ves. Junr. 437.

1. A similar doctrine prevails with regard to *Easements*, the to which may materially affect the value of the property. So *Grey v. Smith*,<sup>(i)</sup> Sir Page Wood, V. C. said :—

"The question of notice concerning the right to an easement is like cases in which notice of possession by a tenant of land is notice of the terms of his holding."

12. If the possession be vacant, the purchaser is bound to inquire as to the title of the last occupant.

13. A purchaser with notice of a deed has notice of *all* its contents. Thus notice of a lease necessarily imparts notice of the contents contained in it.

Where the purchaser cannot make out a title but by a deed, which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognisant thereof; for *crassa negligentia* that he sought not after it:<sup>(j)</sup> and it is immaterial whether the deed leads him to the knowledge of that fact by description of the parties, in recital, or otherwise."

§ 14. But notice of a deed, accompanied by an erroneous statement of its contents, does not necessarily give notice of its *real contents*.

Thus in the cases already cited, *Jones v. Smith, Wigram, V. C.* said :—

"Before advancing money on a Mortgage inquired of *Tones* the Mortgagor and his wife, whether any settlement had been made upon their marriage; and was informed that a settlement had been made, but of the wife's fortune only, and that it did not include the husband's estate, which was proposed as the security; and he afterwards advanced the Mortgage money without having seen the settlement or known its contents, upon the security of a term prior in date to the settlement. It was held by Sir *J. Wigram, V. C.*, that the Mortgagee was not, under the circumstances affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate. This case said his Honor, cannot be brought within the scope of the authorities which at once establish and limit the cases to which the doctrine of constructive notice is applied. For first, it is incontrovertibly clear, that *Smith* had not actual notice of the Mortgaged property being in any way affected with the plaintiff's interest. The contrary of this has not been suggested, and the point, therefore, re-

(i) 22 *Beav.* 299.

(j) *Moore v. Bennet*, 2 *Ch. Ca.* 246.



quires no observation. Therefore, secondly, if *Smith's* estate is to be affected by the plaintiff's claim, it must be upon the ground of his having purposely avoided inquiry, in order to avoid discovery. But is such a supposition consistent with a single fact in this case? His debt was not, like that of *Boulnois*, in *Whitbread v. Jordan*<sup>(k)</sup> an antecedent debt, for which he might be glad to get any security. The advance of his money was contemporaneous with the Mortgage which secures it. His Mortgagor was a needy man, and the evidence proves that *Smith*, at the time for treating for the first Mortgage, so considered him. The letter of October, 1826, which plaintiff has put in evidence, suggests the fraud which was practised upon *Smith*; and the evidence of *Sarah Jones* proves the suggestions in that letter to be true. Where is the ground for questioning the honesty and *bona fides* of *Smith*, even if his caution could be successfully impeached? How can anything, exceeding want of caution, be imputed to the man who parts with his money upon the bare faith of a security, without any assignable motive? The only knowledge *Smith* had was, that there was a settlement. But the contemporaneous assertion respecting that settlement was, that it related to other property than the husband's. A simple denial by *Jones* and his wife, that there was any settlement affecting *Jones's* property, would clearly have made *Smith* safe. How can it be argued, that such denial is qualified by the statement that there is a settlement relating to other property? Nay, more, is not the apparent candour of that statement calculated rather to inspire confidence than to excite suspicion and lay a foundation for inquiry? If *Smith* was bound to inquire after one deed of which he was told nothing, except that it did not relate to *Jones's* estate, why, upon the same principle, should he not be bound to examine any other deed, of the mere existence of which he had noticed? If notice of the existence of a settlement, declared not to affect the husband's estate, is to put a purchaser upon inquiry, only because it may by possibility affect it, how can the plaintiff stop short of the conclusion, that marriage alone should be constructive notice of any settlement that may have been executed? And why, upon the same principle, should not every man who deals with his neighbour, without knowing he is married, be affected with notice of his marriage (if any), and thence with notice of the contents of the settlement? The basis of the plaintiff's argument is this: that a purchaser is imperatively bound to inquire, wherever he has notice of a fact which by bare possibility may affect the subject of his purchase.

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(k) 1 Y and C Exch. Ca. 303.

"The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present. I should myself incline to limit the cases to which the doctrine is applied, rather than to extend them, were it not that the principle upon which these cases are decided, is sound in itself, and that it is better to carry out a sound principle to its just limits, even at the occasional expense of individual hardship, than render the law uncertain and fluctuating, by arbitrarily refusing to apply an acknowledged principle to cases within its range."

§ 15. Parties dealing with undivided Hindu families are bound to take notice of the state of the family. Thus where there are infants, the managing member cannot bind their interests in any transaction not for the joint benefit of the undivided family.<sup>(j)</sup>

§ 16. Notice to an Agent, Attorney, or Counsel, is constructive notice to the principal : and where the same agents are employed on behalf of both parties, notice to the agent affects both parties. But the notice to the agent, &c., must have been acquired in the same transaction : for otherwise, says Lord Hardwicke in *Warrick v. Warrick*.<sup>(m)</sup>

"It would be a pretty harsh thing to affect the lender of the money with all kind of knowledge which the agent may have of the title of borrower ; but still I will not lay it down as a general rule, that where the same person is concerned for the mortgagor and mortgagee, that notice to such person will not be good constructive notice to the mortgagee.

"But consider what kind of notice the defendant *Kniveton* had : Mr. *Hawkins* had not notice at the time of the assignment, nor relative to this business, but before ; even before the original mortgage. In the case of *Fitzgerald* versus *Falconberg*, it was held, the notice should be in the same transaction. This rule ought to be adhered to, otherwise it would make purchasers and mortgagees' title depend altogether on the memory of their Counsellors and Agents, and oblige them to apply to persons of less eminence as Counsel, as not being likely to have notice of former transactions. The notice here was clearly arising from that case stated by *Hawkins* at the request of *Warrick*, in order to do something towards suffering a common recovery ; and it is a year and six months after that *Kniveton* is to be affected with this notice.

(j) Sec. 1. Strange.

(m) 3 A. 92 tk. 4.

"It is very probable that *Hawkins* might have forgotten it in this length of time, or which is much more likely, did not understand the rule of this Court, but took the limitation for an absolute 'estate tail' make purchasers 'and mortgagees' titles depend altogether on the memory of their Counsellors and Agents, and oblige them to apply to persons of less eminence as Counsel, as not being so likely to have notice of former transactions."

§ 17. But where the agent is himself the author of the fraud, notice is not necessarily imputed to the parties. Thus in *Kennedy v. Green*.<sup>(9)</sup>

"Where a Solicitor, employed both by the mortgagor and mortgagee, was himself the author of a fraud, Lord *Brougham*, differing in this respect from the opinion of Sir *J. Leach*, M. R. held, that although the Solicitor had actual and full notice of his own fraud, the mortgagee was not cognisant in law, and, constructively, merely because his Solicitor himself the contriver, the actor, and gainer of the transaction knew it well; but his Lordship affirmed the judgment of the Master of the Rolls on another ground, viz. that it was apparent on the face of the deed that a fraud had been committed, which ought to have led to further inquiries, and the mortgagee was, therefore, constructively affected in the same manner as if he had employed another Solicitor."

§ 18. A public Act of Parliament or of the Legislature is notice to all the world.

§ 19. *Lis pendens* is notice to all the world; for *Pendente lite, nihil innovatur*: and on this point *Storey* well writes as follows:—

"It is upon similar grounds, that every man is presumed to be attentive to what passes in the Courts of Justice of the state or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit.

"Ordinarily it is true, that the decree of a Court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit.

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(9) 3 M. and K. 699.

Where there is real and fair purchase, without any notice the rule may operate very hardly. But it is a rule founded upon a great public policy ; for, otherwise, alienations made during a suit might defeat its whole purpose ; and there would be end to litigation. And hence arises the maxim, *Pendente lite nihil innovatur* ; the effect of which is, not to annul the conveyances ; but only to render it subservient to the rights of these parties in the litigation. As to rights of these parties, the conveyance is treated as if it never had any existence ; and it does not very them. A *Lis pendens*, however, being only a general notice of an Equity to all the world, it does not affect any particular person with a fraud, unless such person had also special notice of the title in dispute in the suit. If therefore, the right to relief in Equity depends upon any supposed co-operation in a fraud, it is indispensable to establish an express or direct notice of the fraudulent act."

§ 20. Notice will be sufficient, if given at any time before the purchase money is actually paid.

§ 21. Other illustrations of the principal maxim (*Volenti non fit injuria*) may be gathered from all departments of the law. On this ground stands the doctrine of *Waiver*, when an irregularity in procedure has been committed ; where the party who might have demurred, has proceeded to take a step without minding the irregularity. He cannot afterwards complain that he has been damnified by the irregularity, for *consensus tollit errorem*. The same doctrine applies to pleading over. On this stands the force of the reply of *leave and license* to an action of trespass ; for a man cannot be a trespasser except against the will of another. A husband cannot bring an action for adultery where he has connived at it. So where money has been voluntarily paid, a man cannot recover it back on the ground that it was not in fact due : as where he might have relied on the law of limitations, but did not : or on infancy. So no man is injured by his own delay.

. Men who sleep upon their rights have no claim upon the tender mercy of the law ; *Vigilantibus et non dormientibus jura subveniunt*. So if any creditor neglects to present any check upon the Bank having funds of mine, and the Bank fails in the interim, it is his loss. But observe that there is no delay where the law makes an exception ; thus infants will not have time run against them during their infancy ; and parties beyond sea are not within the Statutes of Limitation, but may sue or be sued on their return.

## TOPIC THE NINETEENTH.

### SPECIFIC PERFORMANCE.

*Cum quis suam rem vendidit, aut mobilem aut immobilem, emptor tenetur venditori ad pretium, et venditor, e converso, ad ipsam rem tradendam.*

BRACTON.

§ 1. On this ground stands the jurisdiction of Equity to compel the specific performance of a contract, where Law would only give damages for the breach of contract.<sup>(o)</sup> *Nemo potest præcise cogi ad factum* is the language of the Common Law.

"It is well known," writes *Story*,<sup>(p)</sup> "that by the Common Law, every contract or covenant to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract or covenant; and, as such, if it is unperformed by the party, no redress can be had, except in damages. This is, in effect, in all cases, allowing the party the election either to pay damages, or to perform the contract or covenant at his sole pleasure. But Courts of Equity have deemed such a course wholly inadequate for the purpose of justice; and, in considering it a violation of moral and equitable duties, they have not hesitated to interpose, and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse."

The Plaintiff may supply himself with other articles of the same description elsewhere.<sup>(q)</sup> Contracts, as relates to specific performance, may be divided into:

1st. Contracts respecting personal property. The Leading case is that of *Cuddee v. Rutter*.<sup>(r)</sup>

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(o) In the passage quoted from Bracton he continues *Sine traditione non transferuntur rerum dominia*. Where there was no delivery, the Common Law gave no real action; and this was taken from the Roman Law which gave no '*rei vindictio*' where there had been no delivery. *Traditionibus et usucapionibus dominia, verum non nudis pactis transferuntur*; is its language.

The Praetor did not however consider the vendor a trustee for the purchaser, or enforce specific performance. These rulings were the inventions of the Clergy.

(p) Eq. Jur. § 714.

(q) § 1.

(r) 1 T. and W. L. C. in Eq. p. 640.

2nd. Those respecting personal acts.

3rd. Those respecting real property.

§ 2. A distinction has been drawn between suits for specific performance of contracts relating to land, and those relating to personal property. It is true that the feudal prejudices favoured the former, and reckoned the latter of but little worth; but that is not the reason of the distinction. It is evident in regard to contracts for the delivery of goods and chattels, that pecuniary compensation, ordinarily speaking, may measure the damages of a breach with sufficient accuracy; the plaintiff may supply himself with other articles of the same description elsewhere; whereas with respect to land, it is usually the particular land itself which is sought for; and no other piece of land would be an equivalent for the loss of that bargained for. Hence, suits for specific performance of contracts relating to land are far more common in Equity Courts, than of contracts relating to personality. Thus *Story* writes<sup>(s)</sup> :—

“In regard to contracts respecting personal estate, it is (as has been already intimated) generally true, that no particular or peculiar value is attached to any one thing over another of the same kind; and that a compensation in damages meets the full merits, as well as the full objects of the contract. If a man contracts for the purchase of a hundred bales of cotton, or boxes of sugar, or bags of coffee, of a particular description or quality, if the contract is not specifically performed, he may generally, with a sum equal to the market price, purchase other goods of the same kind of a like description and quality; and thus completely obtain his object, and indemnify himself against loss? But in contracts respecting a specific messuage or parcel of land, the same considerations do not ordinarily apply. The locality, character, vicinage, soil, easements, or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser; so it cannot be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations; and therefore a compensation in damages would not be adequate relief. It would not attain the object desired, and it would generally frustrate the plans of the purchaser. And hence it is, that the jurisdiction of Courts of Equity to decree specific performance is, in cases of contracts respecting land, universally maintained; whereas, in cases respecting chattels, it is limited to special circumstances.”

§ 3. At the same time there are numerous instance of suits, at

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(s) § 746, Eq. Jur.

an early date, for specific performance with respect to goods and chattels. Thus, in one case the defendant was compelled to deliver a quantity of wool to the plaintiff, according to the tenor of a recognizance he had entered into; in another, the defendant was decreed to procure for the plaintiff a licence to export certain corn; on that being done, the plaintiff was to deliver to him so much wheat according to the condition of a bond he had entered into: but the plaintiff was in all cases left to his remedy at Law, where that would answer the ends of justice. The principle still remains the same; but now it is considered that compensation in damages is all that justice requires, in many cases where specific performance was formerly decreed, and the parties are accordingly left to the Common Law. So a contract for building a house, and a covenant to repair, might then be enforced in specie; in the latter case viewers were appointed to see to the proper completion of the work.<sup>(4)</sup> Other illustrations may easily be put. Thus, where there was a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by instalments, a specific performance was decreed.<sup>(5)</sup> Under the particular circumstances of the case, there could be no adequate compensation in damages at Law; for the profits upon the contract, being to depend upon future events, could not be correctly estimated by the Jury in damages, inasmuch as the calculation must proceed upon mere conjecture.<sup>(6)</sup>

"A man" writes *Story*<sup>(7)</sup> "may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the buyer; and then a specific performance would seem indispensable to justice. On the other hand, there may be peculiar convenience on the part of the seller; as if a man wants to clear his land, in order to turn it to a particular sort of husbandry; there nothing could answer the justice of the case, but the performance of the contract in specie. Upon the same general ground, an agreement for the purchase of timber trees, to be paid for in six annual instalments, and eight years to be allowed for disposing of the same, and articles of agreement to be drawn up accordingly, has been thought to be a fit case for a decree for a specific performance; especially as, in that case, the agreement,

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(4) Spence Eq. Jur. Vol. I. 647.

(5) *Taylor v. Neville*, cited 3. Atk. 384; but see *Pollard v. Clayton*, 1. K. and J. 462.

(6) *Adderly v. Dixon*, 1. S. and St. 607.

(7) Eq. Jur. § 719.

contemplating future articles, might, perhaps, be deemed incomplete at Law. And, indeed, this last ground alone would be sufficient to sustain the jurisdiction ; and has been adopted on other occasions.

“ Other illustrations may be found in cases, not merely of sales, but of matters peculiarly resting in contracts of a very different nature. Thus, where a covenant was made, in a lease of some alum works, to leave a certain stock upon the premises, a specific performance was decreed ; because the trade would be greatly damaged if the covenant was not specifically performed, contrary to the real justice of the case between the parties ; and the landlord had stipulated for a sort of enjoyment of the premises after the expiration of the lease.

“ Of the like nature are the common cases of covenants, between landlords and tenants, where injunctions, in the nature of a specific performance, are often decreed ; as for instance, covenants not to remove manure or crops at the end of a lease ; covenants not to plough meadow ; covenants not to dig gravel, sand, or coal. In all cases of this sort although the Court Acts merely by injunction, to prevent the breach of the particular covenant, it in effect secures thereby a specific performance ; and it may at once be seen, that such interposition is indispensable to prevent irreparable mischief.

“ Cases of agreements to form partnership, and to execute articles accordingly, may also be specifically decreed, although they relate exclusively to chattel interests ; for no adequate compensation can in such cases be made at Law. Upon the like ground, Courts of Equity will decree the specific performance of a covenant for a lease, or to renew a lease ; so, of a contract for the sale of the good-will of a trade, and of a valuable secret connected with it ; so, of a contract to keep the banks of a river in repair ; so of a contract to pay the plaintiff an annual sum for life, and a certain other sum for every hundred-weight of brass wire manufactured by the defendant during the life of the plaintiff ; so, of a contract for the sale of an annuity payable out of the dividends of stock ; so, of a covenant upon the grant of an annuity to charge the same upon all the property of which the grantor should be possessed at the death of the annuitant, if the grantor should survive him ; so, of a contract for the sale of debts proved under a commission of Bankruptcy, where an assignment of the debt had not been already executed.

“ In like manner, although, where one partner contracts that he will exert himself for the benefit of the partnership, a Court of Equity cannot compel a specific performance of that part of the agreement ; yet, if he has also covenanted, that he will not carry on the same



trade with other persons, there being a partnership subsisting, the Court will restrain him from breaking that part of the agreement. So if a party covenants, that he will not carry on his trade within a certain distance or in a certain place, within which the other party covenanted with carries on the same trade, a Court of Equity will restrain the party from breaking the agreement so made. In each of these cases, the decree operates, *pro tanto*, as a specific performance. The ground of all these decisions is the utter uncertainty of any calculation of damages, as they must in such cases be in a great measure conjectural; or, that some farther act is necessary to be done, to clothe the defendant with a full and effective title to support his claim."

And the rule now is to entertain such suits, where Damages would not be a complete and satisfactory remedy. Let us see what is the language of eminent Judges on this subject. In *Adderley v. Dixon*<sup>(x)</sup> Sir John Leach says:—

"Courts of Equity decree the specific performance of Contracts, not upon any distinction between Realty and Personalty, but because Damages at Law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a Contract for Land, not because of the real nature of the Land, but because Damages at Law, which must be calculated upon the general Money-value of Land, may not be a complete remedy to the Purchaser, to whom the Land may have a peculiar and special Value. So a Court of Equity will not, generally, decree performance of a Contract for the Sale of Stock or Goods, not because of their personal nature, but because Damages at Law, calculated upon the Market-price of the Stock or Goods, are as complete a remedy to the Purchaser as the delivery of the Stock or Goods contracted for; inasmuch as, with the Damages, he may purchase the same quantity of the like Stock or Goods."

§ 4. So it is clear that where a chattel is of a specific value, or has a "*præmium æstimationis*" or "*affectionis*" in the eyes of its owner, or party entitled to claim it, it will be directed to be delivered up; for it could not be compensated for by any money. Thus in the *Pusey Horn* case,<sup>(y)</sup> the family horn, by tenure of which land was held, was ordered to be delivered up. Thus the patera of the Duke of Somerset,<sup>(z)</sup> jewels of the Duke of Devonshire, family

(x) 1 S. and S. 610.

(y) *Pusey v. Pusey*, 1. T. and W. L. C. in Eq. 654.

(z) *Duke of Somerset v. Cookson*, 1. T. and W. L. C. in Eq. 655.

pictures; the tobacco-box of a club. In *Fells v. Read*, Lord *Loughborough*<sup>(a)</sup> said:—

“The Pusey horn, the Patera of the *Duke of Somerset*, were things of that sort of value, that a Jury might not give two-pence beyond the weight. It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange, if the Law of this country did not afford any remedy. It would be great injustice, if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it.”

Indeed the jurisdiction in respect to the delivery up of chattels has been widened in modern times. It is not now confined to chattels which have a *pretium affectionis*, if there be fiduciary relation between the parties. In *Wood v. Rowcliffe*<sup>(b)</sup> where the bill was filed for the delivery up of furniture and household effects, it was argued for the Defendant that they were not within the class of chattels as to which delivery could be decreed, but *Wigram*, V. C. said:—

“I have not the slightest doubt that the Plaintiff is entitled to the protection of the Court against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the Court of Exchequer, formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods by their agents, or persons in the situation of agents. The right to be protected in the use or beneficial enjoyment of property in specie is not confined to articles possessing any peculiar or intrinsic value.”

And Lord *Cottenham*, C. on appeal said:—

“The cases which have been referred to, are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power.

§ 5. The importance of this discussion to the Indian Judge is, to show under what circumstances he should direct a specific

(a) 3 Ves. 71.

(b) 3. Hare, 304, affirmed by Lord *Cottenham*, C. 2. Ph. 383. See also *Dolores v. Rothschild*, 1. S. and S. 590. *Duncuff v. Albricht*. 12 Sim. 189.

performance, or compensate the suitor by damages: for he will have to decide what is the proper remedy in each case that comes before him, and he will see that the question will turn upon this; are pecuniary damages a complete compensation or are they not?

§ 6. The principle upon which Equity proceeds is, that it considers that *as already done which ought to be done*. The maxim of the Roman Law is "*In omnibus causis pro facto accipitur id in quo per alium mora sit quominus fiat.*" So says *Pomponius*. That is always to be considered as done which the fault of another has prevented; and hence, from the date of the bargain to sell land, it holds the vendor as a trustee of the land for the purchaser, and the purchaser as a trustee of the price for the vendor.<sup>(c)</sup>

"In the view of Courts of Law, contracts respecting lands, or other things, of which a specific execution will be decreed in Equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a present or future charge. But Courts of Equity regard them in a very different light. They treat them, for most purposes, precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in Equity as the equitable owner of the land; and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made; and it passes by descent to his heir as land. The vendor is deemed in Equity to stand seised of it for the benefit of the purchaser; and the trust (as has been already stated) attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as a purchaser, with notice of the trust. The heir of the purchaser may come into Equity and insist upon a specific performance of the contract; and unless some other circumstances affect the case, he may require the purchase-money to be paid out of the personal estate of the purchaser in the hands of his personal representative. On the other hand, the vendor may come into Equity for a specific performance of the contract on the other side, and to have the money paid; for the remedy, in cases of specific performance, is mutual; and the purchase-money is treated as the personal estate of the vendor, and goes as such to his personal representatives. In like manner, land, article or devised to be sold, and turned into money, is reputed as money; and money, article or be-

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(c) Story § 790.

queathed to be invested in land, has in Equity, many of the qualities of real estate, and is descendible and devisable as such, according to the rules of inheritance in other cases."

And on the refusal of either to proceed with the contract, Equity will entertain a suit by the other to compel him to perform his agreement specifically.

§ 7. And Equity in enforcing this looks far more to the substance than to the form of the agreement. What the Court requires to be satisfied of is, what the transaction in substance amounts to, and is intended to be, and what was the primary object of the parties.

#### § 8. 2. Contracts to do personal acts.

Such are contracts to build, or rebuild, or to repair, &c. Such are the instances collected by *Story*.<sup>(d)</sup>

"Thus, for instance, a covenant to renew a lease will, (as we have seen,) be specifically decreed. So, a covenant to levy a fine of an estate; for it may be indispensable as a muniment of title. So, a covenant to invest money in lands, and settle it in a particular manner. So, an agreement to settle the boundaries between two estates. Many other cases might easily be put to illustrate the same doctrine, as the case of a covenant not to build upon a contiguous estate, to the injury of an ancient messuage; of a covenant not to cut down timber trees, which are peculiarly ornamental to the mansion of the covenantee; of a covenant not to erect any noisome or injurious manufacturing establishment on an estate adjacent to that of the covenantee in the same street or town; and of a covenant, that a house, to be built adjacent to other houses, should correspond with them in its elevation.

"Courts of Equity will, upon analogous principles, interpose in many cases, to decree a specific performance of express, and even of implied contracts, where no actual injury has as yet been sustained, but is only apprehended from the peculiar relation between the parties. This proceeding is commonly called a bill *quia timet*, in analogy to some proceedings at Law, where in some cases a writ may be maintained before any actual molestation, distress, or impleading of the party. Thus, (as we have seen,) a surety may file a bill to compel the debtor on a bond, in which he has joined, to pay the debt when due, whether the surety has been actually sued or not. And upon a covenant to save

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(d) Eq. Jur. § 729-30.

harmless, a bill may be filed to relieve the covenantee under similar circumstances. So, where property is covenanted to be secured for certain purposes, and in certain events, and there is danger of its being alienated or squandered; Courts of Equity will not interpose to secure the property for the original purposes. And, generally, it may be stated, that in cases of contracts, express or implied, Courts of Equity will interpose to preserve the funds devoted to particular objects, under such contracts; and decree, what in effect is a specific performance, security to be given, or the fund to be placed under the controul of the Court."

§ 9. It is material to consider how far the reciprocal obligations of the party seeking relief have been performed.

"For if" writes *Story*<sup>(e)</sup> "the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from their nature they have ceased to have any just application by subsequent events, or it is against public policy to enforce them. Courts of Equity will not interfere. Thus, where two persons had agreed to work a coach from Bristol to London, one providing the horses for a part of the road, and the other for the remainder, and in consequence of the horses of the latter being taken in execution, the former was obliged to furnish horses for the whole road, and claimed the whole profits; the Court, on a bill by the party, who was so in default for an account of the profits, and to restrain the other party from working the coaches with his own horses on the whole road, refused to interfere, because the default might again occur, and subject the defendant to an action. So, where upon a grant of certain land with a well in it, there was a covenant by the grantees not to sell or dispose of the water from the well to the injury of the proprietors of certain water-works intended for the public supply, but not deriving their supply from the well; upon a bill for an injunction, the Court refused to interfere, on account of the inconveniences, saying, that although the Court will in many cases interfere to restrain a breach of covenant, yet there was no instance to be met with of such a covenant as this. For here the Court must in each instance try whether the act of selling any specified quantity of water was a prejudice to the proprietors of the water-works or not; and that upon such a covenant so framed a Court of Equity ought not to entertain jurisdiction, even if there were no objection on the score of public policy."

§ 10. This jurisdiction, in rescinding or enforcing the specific

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(e) Eq. Jur. § 736.

performance of contracts does not rest upon any right in the parties : but is entirely a matter in the discretion of the Court.

"Not" says *Story*,<sup>(f)</sup> "indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion, which governs itself, as far as it may, by general rules and principles ; but, at the same time, which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. On this account it is not possible to lay down any rules and principles, which are of absolute obligation and authority in all cases ; and, therefore, it would be a waste of time to attempt to limit the principles, or the exceptions, which the complicated transactions of the parties, and the ever-changing habits of society may, at different times, and under different circumstances, require the Court to recognize or consider. The most that can be done, is to bring under review some of the leading principles and exceptions, which the past times have furnished, as guides to direct and aid our future inquiries."

### § 11. 3. Contracts respecting land.

Suits for enforcing the performance of such contracts may be brought, though the land is not within the jurisdiction of the Court, if the parties are resident within the jurisdiction : *Equitas agit in personam*. In the leading case on this point, *Penn v. Lord Baltimore*,<sup>(g)</sup> a specific performance of a contract respecting the boundaries of Pennsylvania and Maryland was decreed by Lord Hardwicke.

He said—

"First, the point of jurisdiction ought in order to be considered, and, though it comes late, I am not unwilling to consider it. To be sure, a plea to the jurisdiction must be offered in the first instance, and put in *primo die* ; and answering submits to the jurisdiction, much more when there is a proceeding to hearing on the merits, which would be conclusive at common law ; yet a Court of Equity, which can exercise a more liberal discretion than common law Courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of Equity appears. It is certain that the original jurisdiction, in cases of this kind relating to boundaries between provinces, the dominion and proprietary government is in the King and

(f) Eq. Jurisp. § 742.

(g) 2. T. and W. Eq.-L. C. 769.

Council; and it is rightly compared to the cases of the ancient commotes and lordships marches in Wales; in which, if a dispute is between private parties, it must be tried in the commotes or lordships; but in those disputes, where neither had jurisdiction over the other, it must be tried by the King and Council; and the King is to judge though he might be a party, this question often arising between the Crown and one lord proprietor of a province in America. So, in the case of the marches, it must be determined in the King's Courts, who is never considered as partial in these cases, it being the judgment of his Judges in B. R. and Chancery. So, where before the King and Council, the King is to judge, and is no more to be presumed partial in one case than in the other. *This Court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries; and this bill does not stand in need of that. It is founded on articles executed in England under seal, for mutual consideration, which gives jurisdiction to the King's Courts, both of law and in equity, whatever be the subject-matter.* An action of covenant could be brought in B. R. or C. B., if either side committed a breach; so might there be for the £5000 penalty, without going to the Council. There are several cases wherein collaterally, and by reason of the contract of the parties, matters out of the jurisdiction of the Court originally, will be brought within it. Suppose an order by the King and Council, in a cause wherein the King and Council had original jurisdiction, and the parties enter into an agreement under hand and seal for performance thereof,—a bill must be in this Court for a specific performance, and, perhaps, it will appear this is almost literally that case. The reason is, because none but a Court of Equity can decree that. The King in Council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the King in Council might look on that, and allow it as evidence of the original right; but if that agreement is disputed, it is impossible for the King in Council to decree it as an agreement. That Court cannot decree in personam in England, unless in certain criminal matters, being restrained therefrom by stat.<sup>(A)</sup> and, therefore, the Lords of the Council have remitted this matter very properly to be determined in another place, on the foot of the contract. *The conscience of the party was bound by this agreement; and, being within the jurisdiction of this Court, which acts in personam, the Court may properly decree it as an agreement, if a foundation for it.* To go a step farther, as this Court collaterally, and in consequence of the agreement, judges concern-

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(A) 16 Car. 1, c. 10.

ing matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical Court, just as a Court of law would maintain an action for damages in breach of covenant."

And on the same subject with reference to the objection that the Court could not enforce any decree which it might make, he said :—

"As to the Court's not enforcing the execution of their judgment, if they could not at all, I agree it would be vain to make a decree; and that the Court cannot enforce their own decree in rem in the present case. But that is not an objection against making a decree in the cause; for the strict primary decree in this Court, as a Court of Equity, is in personam, long before it was settled whether this Court could issue to put into possession in a suit of lands in England, which was first begun and settled in the time of James I., but ever since done by injunction or writ of *assistant* to the sheriff; but the Court cannot to this day, as to lands in Ireland or the plantations. In Lord King's time, in the case of *Richardson v. Hamilton*, Attorney-General of Pennsylvania, which was a suit of land and a house in the town of Philadelphia, the Court made a decree, though it could not be enforced in rem. In the case of Lord Anglesey, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree in rem; but the party being in England, I could enforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this Court. And, indeed, in the present case, if the parties want more to be done, they must resort to another jurisdiction; and it looks, by the order in 1735, as if that was in view, liberty being thereby given to resort to that Board."

§ 12. This branch comprises by far the most numerous, pregnant, and important class in England; where from the operation of the statute of Frauds<sup>(1)</sup> a vast variety of cases has arisen calling for

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(1) 29 Ch. II. C. III. Lord Chancellor *Nottingham* used to say of this statute, that every line was *worth* a subsidy. Mr. *Smith* sarcastically remarks in his work on contracts that it might now be said, every line has *cost* a subsidy, so immense has been the litigation arising upon its construction. It is seriously open to question whether it would not have been wiser to have stood by the statute in all its rigidity from the commencement. Lord *Redensdale* in *Lyndsay v. Lynch*, 2 Sch. & Lef. p. 4. said :—

"I am not disposed to carry the cases which have been determined on the statute of frauds any farther than I am compelled by former decisions: That statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in Courts of Equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result



equitable relief. It is superfluous to inquire minutely into this subject, for my present object. It may be well however, to glance at it. The Statute of Frauds enacts :

"That all interests in lands, tenements, and hereditaments, except leases for three years, not put in writing and signed by the parties, or their agents authorised by writing, shall not have, nor be deemed in Law or Equity to have, any greater force or effect than leases on estates at will. And that no action shall be brought whereby to charge any person upon any agreement made upon any consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party or his lawful agent."

§ 13. The object of this act is clear. It is to prevent setting up pretended parol agreements, and in pursuance of a general policy to reduce contracts to writing, so as to preclude the treachery of human memory. Courts of Equity are as much bound as Courts of Law by this Statute. Yet they have relieved where it would create a wrong. Thus where there is no agreement in writing, but the Defendant *admits* the bargain in *his answer*<sup>(j)</sup> without insisting on the benefit of the Statute. Here the case is held to be taken out of the Statute—and *Quisque potest renuntiare juri pro se introducto*. Again, Equity will clearly relieve where the agreement has not been reduced to writing by the fraudulent intention of the Defendant. Again, Equity will enforce a parol agreement where there has been a *part* execution of the contract,<sup>(k)</sup> for otherwise one

would probably have been that few instances of parol agreements would have occurred ; agreements would, from the necessity of of the case, have been reduced to writing : whereas it is manifest that the decisions on the subject have opened a new door to fraud, and that under pretence of part-execution, if possession is had in any way whatever, means are frequently found to put a Court of Equity in such a situation, that without departing from its rules it feels itself obliged to break through the statute : and I remember it was mentioned in one case in argument as a common expression at the bar, that it had become a practice 'to improve gentlemen out of their estates.' It is therefore absolutely necessary for Courts of Equity to make a stand and not carry the decisions further."

If any Statute, analogous to the Statute of Frauds should be hereafter introduced into this country, our Judges may learn wisdom from the example before them.

(j) 1 Fostl. Eq. B. 1. Ch. 3. Note d. § 8.

(k) This is analogous to the provision of the Statute respecting contracts for goods, where *part performance* takes the contract out of the Statute.

party could practice a fraud upon the other, which it was the very object of the Statute to prevent. What *is* a part performance, is a question of much nicety; into which we need not enter. Suffice it to remark that mere payment of the purchase money, or part of it, or any of those acts which are in the nature of ancillary or preliminary proceedings, such as viewing, or measuring the estate, appraising stock, preparing conveyances, directing registration, and the like, are *not* sufficient.<sup>(f)</sup> The act must be such as is unequivocal; places the parties in a position different from that they occupied before; cannot be compensated by damages. Thus delivery of possession is such an act; here the party taking possession might otherwise be made a trespasser. *A fortiori*, where he has laid out money on repairs, commenced building, and the like, on the faith of the agreement.<sup>(m)</sup> The acceptance of the contract must be without unreasonable delay. So in *Meynell v. Surtees*,<sup>(n)</sup> said—

“When I offer anything to a person,” said Lord *Cranworth*, “what I mean is, I will do that if you choose to assent to it; meaning, although it is not so expressed, if you choose to assent to it in a reasonable time.”

Lord *Cranworth* and in *Williams v. Williams*.<sup>(o)</sup>

“This principle is illustrated by the case of *Williams v. Williams*, of which the circumstances were, that in 1827 A. wrote to B. that he had credited B.’s account with £220 in consideration of an agreement by B. to convey certain houses. The abstract was delivered; but there was no acceptance in writing by B., who, however, five years afterwards, filed his bill against A. for specific performance. It appeared that in 1827 A. had abandoned the treaty, and that in 1829 both parties considered it as broken off, but nevertheless, that B. had in the meantime had the benefit of the credit of £220. The Court dismissed the bill, on the ground that an offer to convert it into a contract must be accepted and acted on within a reasonable space of time.”

§ 14. When the contract is in writing, it may be stated generally that Equity will enforce it where it is certain, is fair in all parts, is for an adequate consideration, where parties are *sui juris*, and is capable of being performed, but not otherwise. The form of the instru-

(f) See *Warner v. Wellington*, 3 Drew : 523. *Thomas v. Blackman*, 1 Coll. C. C. 301.

(m) Finb. C. B. 1. C. 1. § 8.

(n) 1 Jur. n s. 737.

(o) 17 Beav. 213.

ment is unimportant. The substance is to be regarded. It is a maxim that Equity regards not the circumstance but the substance of the act.<sup>(p)</sup>

§ 15. The writing must be certain. On this *Story* writes as follows<sup>(q)</sup> :—

" If they are not certain in themselves, so as to enable the Court to arrive at the clear result of what all the terms are, they will not be specifically enforced. In the first place, it would be inequitable to carry a contract into effect, where the Court is felt to ascertain the intentions of the parties by mere conjecture or guess ; for it might be guilty of the error of decreeing precisely what the parties never did intend or contemplate. In the next place, if any terms are to be supplied, it must be by parol evidence ; and the admission of such evidence would let in all the mischiefs intended to be guarded against by the statute. Indeed, it would be inconsistent with the general principles of evidence, (although there are exceptions) which are administered in Courts of Equity as well as in Courts of Law ; for the general rule in both Courts is, that parol evidence is not admissible to vary, annul, or explain a written contract. A contract cannot rest partly in writing and partly in parol. The writing is the highest evidence, and does away the necessity and effect of the parol evidence, if it is contradictory to it"

§ 16. In considering *certainty*, the points to be borne in mind are 1st, the subject matter : 2nd, the parties<sup>(r)</sup> ; 3rd, the price ; 4th, the terms ; and if the certainty can be ascertained by the Court, it will be sufficient, on the principle *Id certum est quod certum reddi potest*. "*Coale, &c.*" was held to be too indefinite, in *Price v. Griffith*.<sup>(s)</sup> So, as to price, an agreement to sell at a price to be fixed by arbitration is sufficiently certain, for it is capable of being ascertained. *Milner v. Geary*<sup>(t)</sup> is the leading case on that point. But an agreement to sell an estate for 1500 £. less than any other purchaser would give, was held void.<sup>(u)</sup> As to terms, it may be stated that—

"The Court will carry out an agreement framed in general terms, where the Law will supply the details ; but if any details are to be

(p) Francis Maxims xiii.

(q) Eq. Jur. § 767.

(r) See *Monro v. Taylor*. 5 Hare. 51.

(s) 1 DeG. M. and G. 80.

(t) 14 Ves. 400.

(u) *Bromly v. Jeffries*, 2. Vern. : 415.

supplied in modes which cannot be adopted by the Court, there is then no concluded agreement capable of being enforced."

See also *South Western Railway Company v. Wythes*.<sup>(v)</sup>

The following are instances of incompleteness, "an agreement for a building-Case did not state the time when the term was to commence; where it was not stated what time an increased rent was to commence from; where the agreement did not state the length of the term to be granted, either directly or by reference; where a contract for a lease for lives neither named the lives nor decided by whom they were to be named; where an auctioneer's receipt was set up as a contract, but it did not refer to the conditions of sale, or show the proportion which the deposit was to bear to the price; where there was a term as to the expenses which was not settled by the contract; and where there was a contract for a partnership, which defined the term of years, but was silent as to the amount of capital and the manner in which it was to be provided.

"On the ground of uncertainty, the Court has refused specifically to perform marriage-articles prepared by a Jewish rabbi in an obscure form, said to prevail amongst German Jews; and also an agreement for the sale of land, where there was a doubt as to the identification of a plan to be incorporated into the agreement."

§ 17. In considering this part of the subject we may array the parties under a two fold division: first, there is the case of the vendor; second that of the purchaser. Or we may look upon them thus; as seeking a specific performance, or resisting it. And there is an important distinction to be borne in mind here. I cannot put it more plainly than in the words of *Story*.<sup>(w)</sup>

"And, here, it is important to take notice of a distinction between the case of a plaintiff, seeking a specific performance in Equity, and the case of a defendant resisting such a performance. We have already seen, that the specific execution of a contract in Equity is a matter, not of absolute right in the party, but of sound discretion in the Court. Hence it requires a much less strength of case on the part of the defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain a bill to enforce a specific performance. An agreement, to be entitled to be carried into specific performance, ought (as we have seen) to be certain, fair, and just in all its parts. Courts of Equity will not decree a specific performance in cases of fraud or mistake; or of hard and

(v) 5 DeG. M. and G. 68, and see per Lord St. Leonards *Ridgway v. Wharton*, 5, H. of L.C.265.

(w) § 795-70.

unconscionable bargains, or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust; or where a performance has become impossible; and, generally, not in any cases, where such a decree would be inequitable under all the circumstances.

"But Courts of Equity do not stop here; for they will let in the defendant to defend himself by evidence to resist a decree, where the plaintiff would not always be permitted to establish his case by the like evidence. Thus, for instance, Courts of Equity will allow the defendant to show, that by fraud, accident, or mistake, the thing bought is different from what he intended, or that material terms have been omitted in the written agreement; or, that there has been a variation of it by parol; or, that there has been a parol discharge of a written contract. The ground of this doctrine is that which has been already alluded to that Courts of Equity ought not to be active in enforcing claims, which are not, under the actual circumstances, just as between the parties."<sup>(x)</sup>

§ 18. To entitle a party to specific performance he must show that he has not been in default in performing his own part. Gross laches, or application for relief after long lapse of time unexplained, will bar his relief.

"Where" says *Story*,<sup>(y)</sup> "the terms of an agreement have not been strictly complied with, or are incapable of being strictly complied with; still, if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed; and if compensation may be made for any injury occasioned by the non-compliance with the strict terms;<sup>(z)</sup> in all such cases Courts of Equity will interfere, and decree a specific performance. For the doctrine of Courts of Equity is, not forfeiture, but compensation; and nothing but such a decree will, in such cases, do entire justice between the parties. Indeed, in some cases Courts of Equity will decree a specific execution, not according to the letter of the contract, if that will be unconscientious; but they will modify it, according to the change of circumstances."

§ 19. Time is one of the most ordinary topics of consideration in these matters: *vigilantibus non dormientibus leges subseruiant.*

(x) The leading case in *Brotham v. Hearn*, 2 Tudor and White, C. L. in Eq. p. 355. But this is rather a matter for discussion under the Law of Evidence. See my work on Evidence, § 650.

(y) Eq. Jur. § 775.

(z) The Leading case in *Seton v. Slade*, 2, T. and W. H. C. Eq. 377.

One of the most frequent occasions, on which Courts of Equity are asked to decree a specific performance of contracts, writes *Story*,<sup>(a)</sup> "is where the terms for the performance and completion of the contract have not, in point of time, been strictly complied with. Time is not generally deemed in Equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. It is true, that Courts of Equity have regard to time, so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance; or if he comes, *recenti facto*, to ask for a specific performance; the suit is treated with indulgence, and generally with favour by the Court. But then, in such cases, it should be clear that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract; that compensation for the delay can be fully and beneficially given; that he, who asks a specific performance, is in a condition to perform his own part of the contract; and that he has shown himself ready, desirous, prompt, and eager to perform the contract.

"But where there is a substantial defect in the estate sold, either in the title itself, or in the representation or description of the nature, character, situation, extent, or quality of it, which is unknown to the vendee, and in regard to which he is not put upon inquiry, there, a specific performance will not be decreed against him. Upon the like ground, a party contracting for the entirety of an estate, will not be compelled to take an undivided *aliquot* part of it."

§ 20. Let us now turn to the case of the purchaser seeking a specific performance against the vendor. Here again we cannot do better than follow *Story*<sup>(b)</sup> who writes thus:—

"But suits may also be brought by the purchaser for a specific performance under similar circumstances, where the vendor is incapable of making a complete title to all the property sold; or where there has been a substantial misdescription of it in important particulars; or where the terms, as to the time and manner of execution, have not been punctually or reasonably complied with on the part of the vendor. In these, and the like cases, as it would be unjust to allow the vendor to take advantage of his own wrong, or default, or misdescription, Courts of Equity allow the purchaser an election to proceed with the purchase *protanto*, or to abandon it altogether. The general rule,

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(a) Eq., Jur. § 776-8.

(b) Eq. Jur. § 770.

(for it is not universal) in all such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase-money or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate. But if the purchaser should insist upon such a performance, the Court will grant the relief only upon his compliance with equitable terms."

§ 21. This subject will receive further illustration from a reconsideration of the disquisitions on the subject of Accident, Mistake, Fraud, &c.

§ 22. At Law only the parties between whom there is privity of contract are regarded. Put the case of A having contracted to sell his estate to B. A sells it to C with notice of the contract to B. Here as there is no privity of contract between B, and C, B could not enforce any right against C, but must sue A for damages. Equity however looks at this matter in a different light. It holds A a trustee for B; and affects C with notice of the Trust, and it acts against those claiming under an assignment, as well as the assignor.

§ 23. Equity will not decree specific performance, unless there has been a valuable, or at least a *meritorious* consideration, for the contract.

"It will not" writes *Story*,<sup>(c)</sup> "carry into specific execution any merely nude pacts, or voluntary agreements, not founded upon some valuable or *meritorious* consideration; nor between parties not *sui juris*, or competent to contract, as infants, and *femes covert*; nor (as we have already seen) any agreements, which are against public policy, or are immoral, or will involve a breach of trust."

§ 24. With regard to "*Volunteers*," a distinction is drawn between executory and executed contracts.

"We have already had occasion to remark" writes *Story*,<sup>(d)</sup> "that throughout the whole of the preceding discussion respecting Bills for specific performance of contracts, it has been constantly supposed that, the contract was one founded upon a valuable, or at least upon a *meritorious* consideration, in the contemplation of Law. In respect to *voluntary* contracts, or such as are not founded in a valuable consideration, we have

(c) Eq. Jur. § 787.

(d) Eq. Jur. 793 a.

already had occasion to state, that Courts of Equity do not interfere to enforce them, either as against the party himself, or as against other volunteers claiming under him. Thus, for example, if a party should enter into a voluntary agreement to transfer stock to another, or to give him a sum of money, or to convey to him certain real estate, Courts of Equity would not assist in enforcing the agreement, either against the party entering into the agreement, or against his personal representatives, for he is a mere volunteer. The same rule is applied to imperfect gifts, not testamentary, *inter vivos*, to imperfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary defective conveyances. A few cases may serve to illustrate this doctrine. Thus, where a parent had assigned certain scrip to his daughter by a written assignment, which operated as an equitable assignment only, and not as a legal transfer, a Court of Equity refused to compel the donor or his executors to perfect the gift. So, where a lady, by a writing, assigned a bond of a third person to her niece, and delivered the bond to the latter, and then died, a Court of Equity refused to enforce the assignment against the executor, or to decree payment of the money by the obligor to the niece. On the other hand, if the transfer, assignment, trust, or conveyance, is completed at Law, so that no further act remains to be done to give full effect to the title, there, Courts of Equity will enforce it throughout, although it is derived from a mere gift or other voluntary act of the party. Thus, for example, if there is a gift of stock, and a transfer is actually made thereof, it will be enforced against the donor and his representatives. So, if an assignment of a debt or other property is consummate, so as to pass the title, and no farther act is to be done by the donor, it will be enforced in Equity."

§ 25. Where there is some comparatively immaterial point which cannot be performed, Equity will nevertheless decree a specific performance as far as it is possible, and give pecuniary compensation for that which the party cannot obtain. The leading case on this subject is that of *Seton v. Slade*, selected by *Tudor and White* in their *Leading Cases in Equity*<sup>(e)</sup> and in *Halsey v. Grant*,<sup>(f)</sup> Lord *Erskine* said,

"Equity does not permit the forms of Law to be made instruments of injustice; and will interpose against parties attempting to avail themselves of the rigid rule of Law for unconscientious purposes. Where, therefore, advantage is taken of a circumstance, that does not admit a strict performance of the contract, if the failure is not substantial, Equity will inter-

(e) 2 Vol. p. 429.

(f) 13 Ves. 77.



fere. If for instance, the contract is for a term of ninety-nine years in a farm, and it appears that the vendor has only ninety-eight or ninety-seven years he must be nonsuited in an action: but Equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference being of no importance to him, Equity will interfere. Thus was introduced the principle of compensation, now so well established—a principle which I have no disposition to shake.”

§ 26. Thus when a purchaser has contracted to buy a larger estate than the vendor really has to sell, Equity will decree performance by ordering a conveyance of such estate as the vendor has, and award compensation to the purchaser for that which he cannot have in specie. Thus in *Mortlock v. Buller*,<sup>(g)</sup> Lord Eldon said:—

“If a man having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole.”

Though the vendor could not compel the purchaser to complete his purchase under such circumstances, the purchaser has his election to take what he can get, plus compensation.

§ 27. But where there is a *substantial* difference, this doctrine does not obtain: as where a contract was for the sale of a lease of sixteen years and it turned out but six.

§ 28. The late case of *Prothero v. Phelps*<sup>(h)</sup> contains some important remarks by Sir G. Turner, L. J. upon this subject; which it may be well to quote.

“The defendant had originally a right to proceed either at law for a breach of the agreement, or in this Court for a specific performance of it. He adopted the latter remedy. I think a plaintiff who has legal rights, and comes to this Court for its aid, is bound to put his legal rights under the control of the Court, and that that principle reaches the present case. The plaintiff, therefore, having sued the defendant for a specific performance, was bound, in my opinion, to sub-

(g) 10 Ves, 315.

(h) 2 Jur. n. s. 175.

mit his claim for damages to the judgment of this Court, and was not entitled to proceed at Law otherwise than by leave of this Court. That it is competent to this Court to ascertain damages I feel no doubt. It is the constant course of the Court, in the case of vendor and purchaser, when a sufficient case is made for the purpose, to make an inquiry as to the deterioration of the estate; and in so doing the Court is, in truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed."

§ 29. Courts of Equity will not interfere, unless it is clear that their order will be effectual. Thus an injunction will not be granted to restrain the making of a secret medicine; for if it be secret, how can the Court tell whether its order has been infringed? <sup>(i)</sup> So when a contract is revocable; for the party might revoke it after the order issued. <sup>(j)</sup> So with respect to the performance of contracts of rendering services of a confidential character; for how can the Court compel confidence. Thus in *Johnson v. Shewsbury* and *Birmingham Railway Company*. <sup>(k)</sup> Knight Bruce, Lord J. said—

"We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done."

§ 30. Neither will a Court interfere if it can only perform a part of the contract, except perhaps where the difficulty arises from the fault of the defendant; for that would be to allow a man to take advantage of his own wrong. Thus in *Nicholls v. Hancock* <sup>(l)</sup> the Court agreed to separate the parts of an award which were capable of specific performance from those which were not. It was formerly held that when the affirmative part of a contract could not be performed by the Court, the negative should not be enforced by injunction. Thus where an actor had agreed to act at a particular theatre, the Court would not restrain him from acting at any other; but now the great case of *Lumley v. Wagner* <sup>(m)</sup> has established the rule that the Court can so interfere. Thus Lord

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(i) *Newberry v. James*, 2. Mer. 446.

(j) *Wheeler v. Trotter* 3. Sw. 174. n. See also *Strane v. Minton*. Ry. Cy. Week. Rept. 1857, p. 283. V. G. Stuart.

(k) 3 De. G. M. and G. 926.

(l) 7 DeG. M. and G. 300.

(m) DeG and C. 604.

*St. Leonards* enjoined the singer *Johanna Wagner* from singing elsewhere than at the theatre of her engagement.<sup>(a)</sup>

§ 31. Courts will not interfere where there has been a gross inadequacy of consideration. Mere inadequacy of consideration is not a ground of interference; for it is impossible to draw the line. The Roman Law surmounted this difficulty by relieving when the consideration was less than half the value. The French Law follows the Roman, except that in cases of sales between coheirs, &c. a defect of one quarter is sufficient to set aside the transaction. Our Law lays down no rigid rule, but requires that the defect of consideration must be so gross as to amount to fraud; to be a badge of fraud.

"Unless the inadequacy of price" said Lord *Eldon* in one case,<sup>(b)</sup> "is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance *Stil v Wilkins*."<sup>(c)</sup>

And in *Abbott v. Swoorder*,<sup>(d)</sup> Where an estate was brought for £5000, the value of which was considered by the Vice-Chancellor Knight *Bruce*, to be £3,500; but this inadequacy of consideration was held, both by him and by Lord *St. Leonards*, to be no bar to specific performance, which was accordingly decreed at the suit of the vendor.

Where there is a total failure of consideration the contract will not be specifically performed. Thus where a contract for sale of a life annuity was concluded in England on the 28th February; and the annuitant died in New South Wales on the 6th proximo, it was held to be no contract. See *Strickland v. Turner*,<sup>(e)</sup> and in *Couturier v. Hastie*<sup>(f)</sup> the House of Lords held that a contract for the sale of a floating cargo, which it turned out the Captain had sold on account of sea damage, could not be specifically performed.

§ 32. Courts will not interfere where there is a want of mutuality in the contract; that is to say, that at the time it was entered into, it could not have been enforced against both parties. Thus an *infant* cannot sue, because he cannot be sued, for specific perfor-

(a) And see *Worther v. Dillon*, 3. Jur. n. s. 432.

(b) In *Coles v. Trecothick*, 9 Ves. 246.

(c) Jac. 282.

(d) 4 DeG. and G. M. 448.

(e) 7. Ex. 208.

(f) 8. Ex. 40. 9. Ex. 102, 5. H. of L. 673.

mance. Of course this objection does not apply to *unilateral* contracts, as where an agreement is in the nature of an undertaking.

§ 33. Illegality of the contract is of course a bar to the assistance of the Court; for, *ex dolo malo non oritur actio*.

§ 34. A contract which is *ultra vires* will not be enforced. The most usual illustrations of this doctrine are to be found in Railway and other Corporation and Joint Stock Company cases, where their powers are generally defined by deed or charter. The great case of *The Shrewsbury and Birmingham Railway Company v. London and Northern Western Railway Company*,<sup>(†)</sup> is the Leading Case.

§ 35. Where the contract is expressly beyond the powers confined by the deed or instrument, little difficulty can arise. It is a question of simple construction: but more difficulty arises in considering whether a contract is by implication *ultra vires*. Any contract which defeats the object of the Company clearly is so; so again where the Corporation engages in business foreign to its objects. This was much considered in the *East Anglian Railway Company v. The Eastern Counties Railway Company*,<sup>(\*)</sup> where it was held that no action could be maintained on a covenant by the defendants to pay to the plaintiffs the costs incurred in applications to Parliament by the plaintiffs, at the instance of the defendants, for obtaining powers which the defendants considered it desirable for their interests that the plaintiffs should possess.

This case has been followed and recognized by others. In *Eastern Railway Company v. Hawkes*,<sup>(\*)</sup> But see the *Mayor of Norwich v. Norfolk Railway Company*.<sup>(\*)</sup>

§ 36. Cases may arise between Shareholders and Directors, or between the Company and third parties. In the latter case it will be no defence to the Company, unless such third parties had notice that the Directors were acting *extra vires*. Thus if a party *bona fide* sells land to a Railway Company, he is not bound to see that it is strictly required for the purposes of the Railway. In *Coleman v. Eastern Counties Railway Company*.<sup>(\*)</sup> Lord Langdale at the instance

(†) 6 H. of Lord's Cases 135.

(\*) 5 H. of L. Case 331.

(\*) 11. C. B. 775.

(\*) 4. Ell. and Bl. 397.

(\*) 10 Beav. 17.

of a Shareholder restrained the Company from applying its funds to the establishment of a steam communication between the South and the North of Europe, with a view to the increase of Traffic.

§ 37. Misrepresentation, fraud, mistake, are of course bars to specific performance; as their effect has been considered under these respective heads, it is unnecessary to say more upon them here.

§ 38. The inclination of the Court in modern times is to decree specific performance with *compensation*, when particular parts are not capable of performance: and that seems an equitable mode of adjustment between the parties. Thus in *Prothero v. Phelps*.<sup>(9)</sup>

A. having obtained a decree against B. for the specific performance of an agreement, brought an action at Law for the consequent damages which he alleged himself to have sustained by the destruction of his business: B. then filed a bill against A., asking that he might be restrained from proceeding at Law, to which the Court acceded, notwithstanding the argument that the Court could not give damages. "That it is competent to this Court to ascertain damages, I feel no doubt," said Lord Justice *Turner*, "it is the constant course of the Court in the case of vendor and purchaser, where a sufficient case is made for the purpose, to make an inquiry as to the deterioration of the estate, and in so doing, the Court is, in truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed."

§ 39. But this course will not be adopted when a material part of the thing contracted for is wanting.

§ 40. Compensation is fitting where there has been deterioration since the contract, as for instance when a stone-quarry has been quarried.

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(9) 25 L. J. Ch. 105.

TOPICS OF JURISPRUDENCE: <sup>cf</sup>

*for*  
Aids to the Office of the Indian Judge.

*h* *M*  
BY

JOHN BRUCE NORTON, ESQ.

BARRISTER-AT-LAW.

---

"Hæc disciplina studium atque cognitio in principiis quidem tetra et aspernabilis insuavisque esse et inutilis videri solet: sed ubi aliquantum processeris, tum denique et emolumentum ejus in animo tuo dilucebit, et sequetur quædam discendi voluptas insatiabilis."—AULUS GELLIVS.

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PART II.

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MADRAS:

J. HIGGINBOTHAM, MOUNT ROAD.

Law Bookseller and Publisher.

1862.

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## PREFACE.

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The title of this volume sufficiently explains its object, which is not to write a treatise upon *Jurisprudence*, a subject which would require far more time and study than I could hope to bestow on it ; but to furnish judges, practitioners, and students, with some aids on those *topics* of law which are of the most ordinary occurrence in forensic practice.

It is not even attempted here to write a complete or exhaustive essay upon any of the subjects selected for illustration. The time will doubtless come when India will be supplied with a set of Text-books written for her especial use, and adapted to her wants and conditions ; and indeed a commission has been appointed in England to digest a Code of Civil Law applicable to all India, an undertaking which I humbly conceive will prove *Opus Heroicum* : but until that task shall have been performed, it is perhaps not out of place to endeavour to bring together, within a reasonable compass, so much of the learning of the English Law, as may afford a *ratio decidendi* on many of the points which are constantly arising in the progress of litigation. Text-books are very expensive, and contain much that is not applicable to law and practice in India ; while Reports are almost, if not entirely, beyond the reach of the Indian Legal profession. Hence in the present work I have quoted at length the passages from the various judgments which throw light upon the subject under discussion, instead of



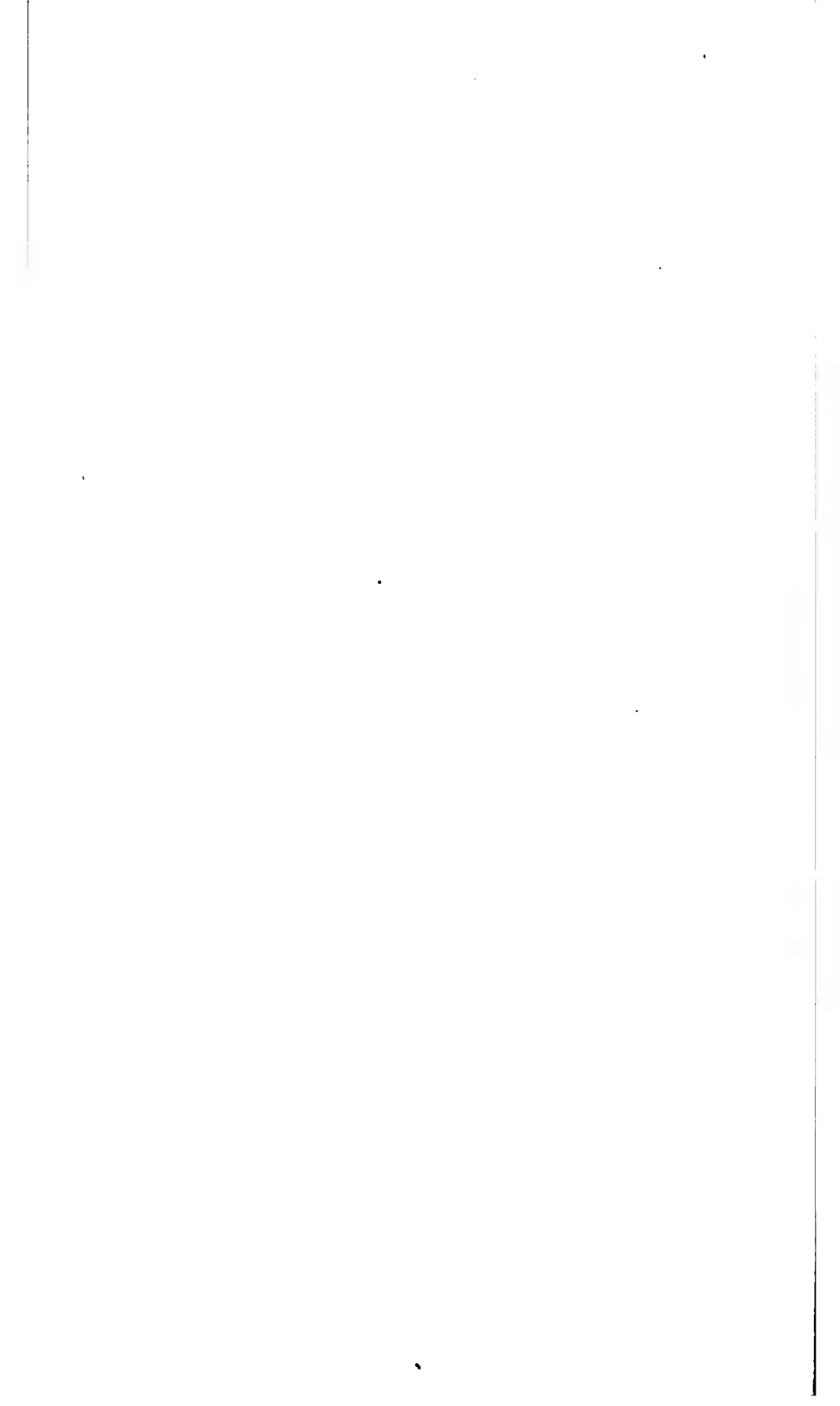
barely referring to the books in which the cases are contained. It is to be hoped that those who can afford it, will supply themselves with the books I have specified in the Preface to the Law of Evidence ; and if in addition, the Jurist or Weekly Reporter be regularly taken in, new cases upon the subjects in this volume may be usefully noted up : so that each Topic may be regarded as a nucleus around which to collect the products of future study and research. Many additional Topics might have been selected, conveying information very requisite for the Indian Lawyer. But a limit must be drawn somewhere ; and a reference to the general Index will show that there is so much general instruction imparted, that he who fairly masters the contents of this volume will be at least *par negotiis* on many points of Law ; and it is my hope that this volume may be made the text-book for examination in general Law and Equity, at any rate until substantive treatises, such as I have above referred to, or a Code of Substantive Civil Law with ample commentaries, shall take its place.

I have spared no pains in making this volume accurate and reliable ; and I am much indebted to the kindness of Mr. Branson, who supervised the greater part of the sheets as they passed through the Press, and added many very recent cases and valuable notes. His name will be a sufficient guarantee for the value of his contributions. The work cannot be free from imperfections, which may be remedied in any future edition, if they should be pointed out ; and I trust hereafter to be able to add both to the number of Topics, and to the illustrations of those already in print. But should I not be able to accomplish this, it is a satisfaction to think that Legal Education has received such

an impetus in this Presidency, and indeed in India at large, that there will be henceforth no want of legal writers ; since the demand for legal knowledge is ever growing more and more peremptory. Younger men are stepping forward ; and if I should do no more, I trust I am not presumptuous in expressing a hope, that I may be deemed, in the contributions which I have made to the Library of the Indian Lawyer, to have partly discharged that duty which Lord Coke says, every Lawyer owes to his Profession.

MADRAS,  
1st *May*, 1862. }

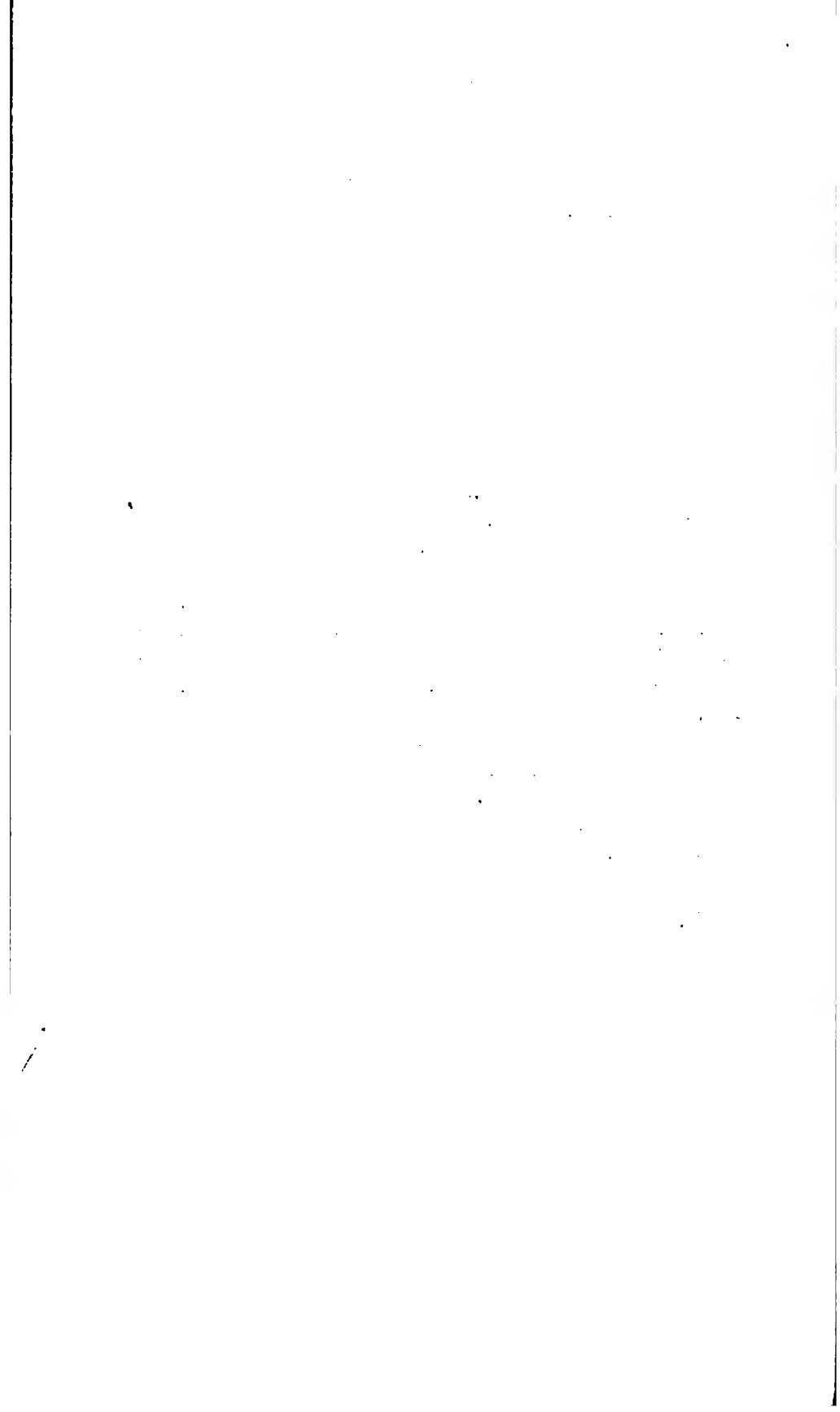
JOHN BRUCE NORTON.



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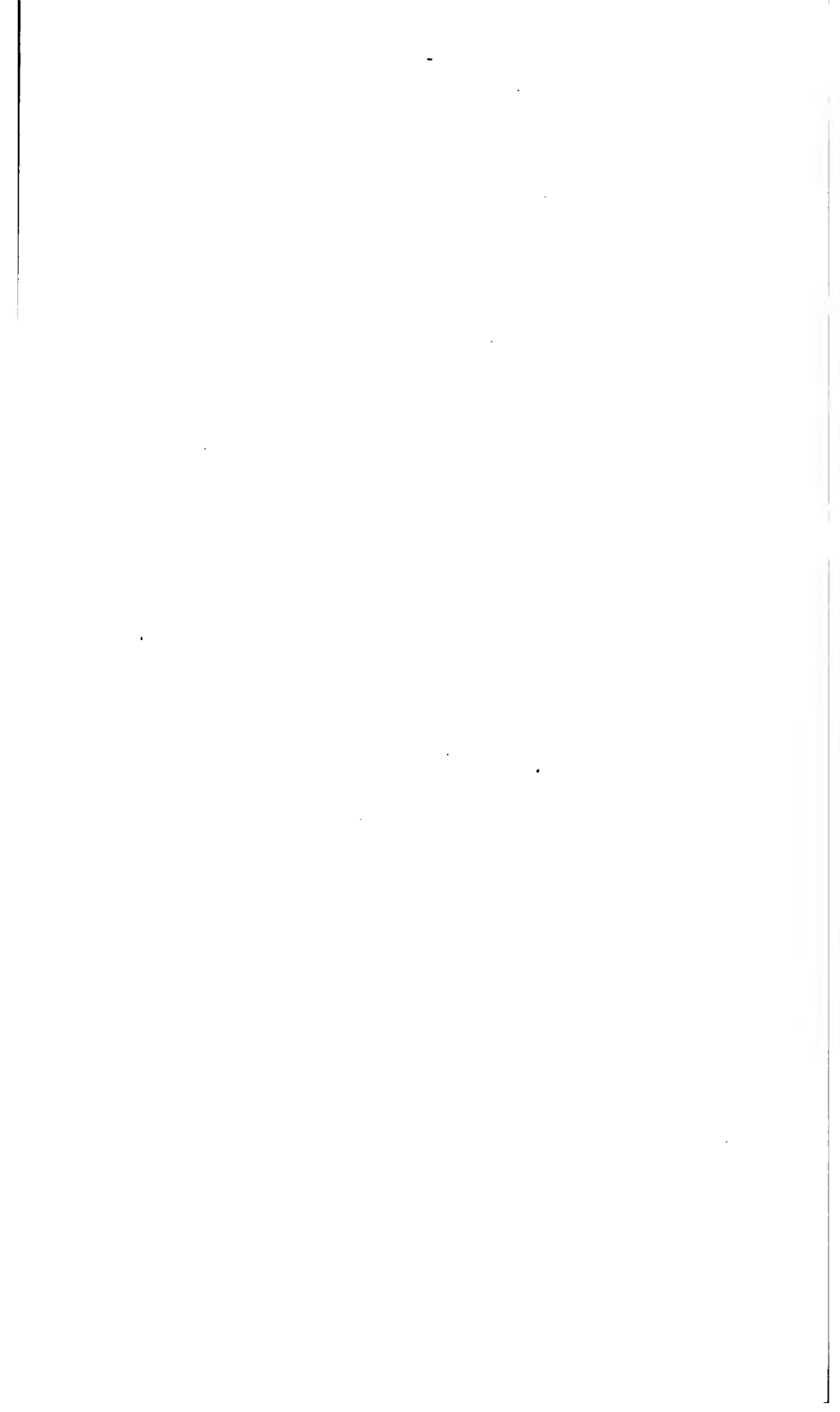
|                       |                                              |
|-----------------------|----------------------------------------------|
| A & E.....            | Adolphus and Ellis.                          |
| B & Adolfe.....       | Barnewall and Adolphus.                      |
| Ball & B.....         | Ball and Beattie.                            |
| B & C.....            | Barnewall and Creswell.                      |
| Beav.....             | Beavan.                                      |
| Br. P. C.....         | Brown's Parliamentary Cases.                 |
| Bing.....             | Bingham's Reports.                           |
| B N C.....            | Bingham's New Cases.                         |
| B & P.....            | Bosanquet and Puller.                        |
| Broom L. M.....       | Broome's Legal Maxims.                       |
| Burr.....             | Burrow's Reports.                            |
| C B.....              | } Common Bench Reports.                      |
| Com: B. R.....        |                                              |
| C & K.....            | Carrington and Kiorwan's Reports.            |
| Cl. & Fin.....        | Clarke and Finnely's House of Lords Reports. |
| Coll. C C.....        | Collier's Chancery Cases.                    |
| C Litt.....           | Coke upon Littleton.                         |
| C & P.....            | Carrington and Payne's Reports.              |
| De Gex Mac & Gor..... | De Gex, Macnaghten and Gordon's Reports.     |
| Dig.....              | Digest.                                      |
| Dougl.....            | Douglas' Reports.                            |
| Durn & Ea.....        | Durnford and East.                           |
| Dr. & W.....          | Drewry and to Walker.                        |
| El. & Bl.....         | Ellis and Blaxland.                          |
| Eq. Jurisp.....       | Equity Jurisprudence.                        |
| Fitz. Nat. Brev.....  | Fitzherbert Natura Brevium.                  |
| Fonb Eq. P.....       | Fonblanque's Equity Pleadings.               |
| G & D.....            | Gall and Dairson.                            |
| Glyn & Jam.....       | Glyn and Jamieson.                           |
| H of L C.....         | House of Lords Cases.                        |
| H & N.....            | Hurlestone and Norman.                       |

|                     |                                   |
|---------------------|-----------------------------------|
| Jac. & W.....       | Jacob and Walker.                 |
| Jur.....            | Jurist.                           |
| Kent's Com.....     | Kent's Commentaries.              |
| Ld. Ray.....        | Raymond's Reports.                |
| L. J. C. P.....     | Law Journal. Common Pleas.        |
| L J. Exch.....      | „ Exchequer.                      |
| L J Q B.....        | „ Queen's Bench.                  |
| L J.....            |                                   |
| L J Ch.....         | „ Chancery.                       |
| L J N. S.....       | „ New Series.                     |
| Lev.....            | Levinge's Reports.                |
| M Cr & R.....       | Meeson Crompton and Roscoe.       |
| Macq H L C.....     | Macqueen's House of Lords Cases.  |
| Madd .....          | Maddox' Reports.                  |
| Mag Ca.....         | Magistrates Cases.                |
| M S A.....          | Madras Sudder Adawlut Reports.    |
| Mann & Gr.....      | Manning and Grainger.             |
| Marshman C & G..... | Marshman Carrington and Grainger. |
| Mod Rep.....        | Modern.                           |
| Moore's T A.....    | Moore's Indian Appeals.           |
| Moore's P C C... .. | Moore's Privy Council Cases.      |
| M S R.....          | Madras Sudder Reports.            |
| M & L.....          | } Mylne and Craig.                |
| Myl & Cr.....       |                                   |
| M & R.....          | } Mylne and Rusell.               |
| Myl & Rus.....      |                                   |
| Phil Ch.....        | Phillip's Chancery Reports.       |
| P W.....            | Peer William's Reports.           |
| Q B.....            | } Queen's Bench Reports.          |
| Q B R.....          |                                   |
| Rep Temp Finch..... | Reports in the time of Finch.     |
| Roll Abr.....       | Roll's Abridgment.                |
| Ruse Rep.....       | Rusell's Reports.                 |
| Salk.....           | Salkeld.                          |
| S. C.....           | Same Case.                        |
| Sch & Lef.....      | Schoales and Lefroy's Reports.    |
| Scott N R.....      | Scott's New Reports.              |
| Show.....           | Showers.                          |
| Sm L C.....         | Smith's Leading Cases.            |
| Spence E J.....     | } Spence's Equity Jurisprudence.  |
| Spence Eq Jur.....  |                                   |

|                  |                                          |
|------------------|------------------------------------------|
| Str.....         | Strange's Reports.                       |
| Sug V & P.....   | Sugden's Vendors and Purchasers.         |
| Taun.....        | Taunton's Reports.                       |
| T & R.....       | Turner & Russell's Reports.              |
| Tud & W L C..... | Tudor and White's Leading Cases.         |
| T M L C.....     | Tudor's Leading Cases in Mercantile Law. |
| Vern.....        | Vernon's Reports.                        |
| Vent.....        | Ventris' Reports.                        |
| Ves.....         | Vesey's Reports.                         |
| W Bl.....        | William Blackstone's Reports.            |
| Y & C.....       | Young and Colleyer's Reports.            |
| Y & J.....       | } Younge and Jervis Reports, New Series. |
| Y & J N S.....   |                                          |







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## TOPIC THE TWENTIETH.

### TRUSTS.

*Equity will never want a Trustee.*

Co. Litt. 290<sup>b</sup> Butl : note (1) ib. 113<sup>a</sup> Butl : note (1.)

§ 1. Such is one of the fundamental axioms recognized in our Courts ; and therefore when there is no Trustee actually named in an instrument which raises an equity in favour of one of the parties, a Court of Equity will interfere and constitute the one from whom the duty moves a Trustee for the other. A common instance of this arises in English Courts in the case of property bequeathed to a *feme covert* for her sole and separate use, without the intervention of any Trustee to save it vesting *at law* in the husband. Here Equity will not let the trust fail, or the intention of the donor be defeated for want of a Trustee, but constitutes the husband a Trustee ~~for the~~ benefit of his wife.

So in *Rich v. Cockell*,<sup>(a)</sup> Lord Eldon said :—

“ It is perfectly settled that a husband may in this Court be a trustee for the separate estate of his wife.”

§ 2. So if the settlor do appoint a trustee who declines to act, or fails, or becomes incapable, Equity will not let the trust fall through, but will follow the estate into whosoever's hands it goes, (other than a *bond fide* purchaser, for valuable consideration, without notice) and attach the trust to it. The legal estate is indeed but the shadow, the trust is the substance in such a case. So in the case of the *Attorney General v. Lady Dowking*.<sup>(b)</sup>

“ I take it,” said Lord Chief Justice *Wilmot*, “ to be a first and fundamental principle in equity, that the trust follows the legal estate wheresoever it goes, except it come into the hands of a purchaser for valuable consideration without notice. I never heard any distinction made, nor has any case been cited to prove, that a trust, fit and proper to be

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(a) 9 Ves : 375.

(b) *Wilmot*, 21.

executed against a trustee, should be suffered to fall to the ground, and remain unexecuted against an heir at law, where there was no trustee. The lapse of the legal estate never has the least influence upon the trusts to which it is subject. Trust estates do not depend upon the legal estate for an existence. A court of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate or of one another; and the legal estate is nothing but the shadow, which always follows the trust estate in the eye of a court of equity."

§ 3. To an English Lawyer the subject of Trusts is a most important one, and full of technical learning. I do not however propose to enter upon any of those topics which may not have a practical bearing on the administration of justice in this country; and I shall therefore confine my observations to a comparatively small area of this wide subject, and treat only of the more popular parts of the doctrine of Trusts.

§ 4. It does not often happen perhaps in this country, that among Natives, Trusts are expressly created by the deeds of the parties; and the separation of the legal and equitable estate is scarcely known. In Benamée transactions, no doubt, a Trust is created; but to its use for moulding the devolution of property upon various contingencies as they arise, as in the case of marriage settlements, wills, and the like, the comparatively rude state of Native Society is a stranger. Little will accordingly be found in the reports of Indian cases on this topic. In Wills, the Executor is of course a trustee; and in the largest sense in which the term is used, that of a confidence reposed by one man in another, it will be found that all the business transactions of life are daily giving rise to trusts, which though not express, Equity will enforce: and there are many admirable canons with respect to the creation, duties, and liabilities of Trustees, laid down by the Court of Chancery, which may be well followed in every country where confidence is reposed in one citizen by another. Of course, a Trust arises from many of the relations of life without any words or writing; and it may be said generally that every one who undertakes a fiduciary burthen on behalf of another, is a Trustee for that other. As instances of Trustees in this country,

constituted by the relation of the parties, I would mention the Head of an undivided Hindu family, who is a Trustee for all the members; and the manager of a religious endowment, whether Hindu or Mahomedan.<sup>(c)</sup> 1)

§ 5. "A Trust, in the most enlarged sense in which that term is used in English Jurisprudence," says *Story*,<sup>(d)</sup>

"May be defined to be an equitable right, title, or interest, in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law, but the income, profits, or benefits thereof in his hands belong wholly, or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges, in favour of others; and these uses, benefits, or charges constitute the trusts, which Courts of Equity will compel the legal owner, as trustee, to perform in favour of the cestui que trust, or beneficiary."

§ 6. It is unnecessary to consider technically how Trusts sprang from Uses, and the jurisdiction which the Court of Chancery assumed upon the narrow construction put by the Common Law Judges upon the Statutes of Uses. That is matter of historical research for the curiously disposed, so far as this country is concerned; what is more to our purpose is, to trace the origin of the doctrine of Trust in the Roman Law: The *Fideicommissum* was singularly enough instituted in Rome for the same purpose as that for which the Trust was originally introduced into England, that is, to evade the Law. In Rome,

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(c) That the managing member is a trustee for the whole of the family, is a principle which may be traced through the whole Hindu Law on that subject; and too familiar to require illustration. But see *Anon.* Case 28 of 1814. 1 *Madr. Dec.* 118. *Aushertoe Doss v. Moheschunder Dutt & Others.* 1 *Fulton*, 380. *Rajah Baidyanand Singh v. Rudranand Singh.* 5 *S. D. A. Rep.* 198. *Govindchund Sing v. Simpson.* *East's Notes of Cases.* 2 *Morley's Dig.* 193. *Chowcaren O. Q. Ahmond v. Naicenzee Mooktear,* *Madr. S. A. Dec.* for 1849, p. 17. So the return to the head member, of jewels deposited by other members, has been held a good defence to an action by them against the mortgagee; 13 of 1824, 1 *Mad. S. D. p.* 482.

That the Managers of religious endowments are Trustees, is only too well proved by the instances in which they have been brought up under the Breach of Trust Act XIII of 1859. As to the general powers of a Durmakhat. See *Sp : App :* 37 of 1848. *Mad. S. R.* for 1849, p. 37.

(d) *Eq. Jur.* § 964.

the object was to evade the numerous cases in which the *Jus Civile* refused to permit inheritance, especially the Voconian Law. In England our clerical Chancellors transplanted the Roman contrivance to evade the Statutes of "Mortmain."

// The following passage, taken from Justinian, will explain this.

*Adm. Valerius*

"In former times, all fideicommissa were ineffectual, because no one was compellable to execute the trust vested in him: for inheritances were transmitted to persons who could not validly be made heirs, by desiring others who were capable, to transfer the inheritance to them. These species of inheritances were called fideicommissa, because they were sanctioned by no bond of law, but only rested upon the honour and conscience of those to whom the request was addressed. The Emperor Augustus, however, influenced by a desire to favour persons placed in certain situations, or because a solemn adjuration was directed to him by testators, or indignant at the gross breach of faith of which some persons were guilty, ordered the Consuls to interpose their authority in these matters. And as this was both just and popular, there soon arose a permanent jurisdiction in matters of trust, and that jurisdiction became so great a favourite, that a Prætor was appointed to decide upon matters of fideicommissum, who was called Prætor Fideicommissarius."<sup>(c)</sup>

§ 7. The following succinct account of the origin and progress of the Roman Law is taken from Mr. Spence's work. (f)

"During the latter years of the republic, with a view to evade the prohibitory laws as regarded successions and legacies, particularly the Voconian law, which precluded the appointment of a female, even an only child, as heir, by any one included in the census, it had become a practice to constitute by will, a qualified citizen as heir, that is, in our language, universal devisee and executor, with a request that he would restore the inheritance, or a portion of it, to some person who could not take it by direct appointment.

"Before the time of Augustus, the execution of such trusts was left to the honour of the person so selected. The solicitation of individuals, and some gross instances of breaches of the confidence reposed, induced Augustus to interfere. First, he ordered the consuls to compel the performance of such trusts, or Fideicommissa, as they were termed; and as this exercise of authority was supported by the popular voice, it settled

(c) Instit. lib. ii. tit. xxiii. § 1.

(f) Eq. Jurisp. 436.

*Adm. Valerius*

*Is. Talbot*

*John Philipson*

*Chas. King*

into an established Jurisdiction. At length Augustus created a prætor at Rome, to whom the jurisdiction over fidei-commissa was especially committed. Claudius added two others, one was withdrawn by Titus, whom Nerva, as before mentioned, placed in the imperial Exchequer.

"In the provinces, the Præses, from the time of Claudius, enforced the performance of trusts, as part of the extraordinary jurisdiction annexed to his office.

"Why Augustus and his successors did not exert their authority to procure an alteration in the law, rather than to secure the means of its evasion, is a question on which we are left without any explanation from contemporary or subsequent writers. The precedent has had a most material influence on our system of jurisprudence.

"The prætor fidei-commissarius at Rome, so long as the office was continued, and the præses in the provinces, personally decided all questions as to this description of trust. The præses was assisted by a certain number of experienced jurisconsults as assessors, of whom mention has already been made. The proceedings were conducted in this, as in every case addressed to the extraordinary jurisdiction of the præses, not by means of formulæ, which could not be adapted to such cases, but by libel, or by way of information, and without the formalities, either as regards the pleadings or the judgment which were pursued in Civil and Prætorian actions; and some rules were applied in enforcing fidei-commissa, which did not prevail as to similar matters cognizable in the ordinary course of law.

"The doctrine of trusts having been established in regard to wills, an attempt was made to introduce trusts in conveyances inter vivos, for the purpose of evading other provisions of the law. Thus a purchaser of land who desired to avoid serving those offices to which, as owner, he would be subjected, or escaping from other liabilities, had the land conveyed in trust to some land-owner who already held office. To frustrate these attempts an imperial rescript was issued, which pronounced that the real owner should be liable to all burthens and duties attaching on the property; and afterwards it was declared that such conveyances should operate as a forfeiture of the estate. Whether conveyances upon trust for legitimate purposes ever came into use does not appear.

"As regards testamentary fidei-commissa, in the time of Nero, Trebellius Maximus and L. A. Seneca being consuls, a senatus-consult was passed which has already been noticed, by which it was enacted, that he to whom the inheritance was committed fidei-commissi causâ, should, as quasi heir, have and be liable to all the actions which were given by the Civil Law to and against an heir; but as there could be no

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trust without the appointment of an heir, the heir still retained his legal character and name. However, as in many cases no one could be induced to take a bare office without profit, Vespasian in order to induce the heir to accept the inheritance in trust, allowed him to retain to himself one-fourth of the inheritance beneficially, in respect of which, in Justinian's time, he was liable, *pro ratâ*, to the obligations incident to the character of heir, unless he restored the whole to the *fidei-commisarius*, or as we say *cestui que trust*, who in that case was liable to the whole of the burthens. Any specific estate or property might equally be given by way of *fidei-commis*; and an intestate might impose a *fidei-commis* on his heir by legal succession. One great purpose to which this scheme of *fidei-commis*ary gift was turned, was, as already noticed, the entailing of estates without the power of alienation, on children and on freedmen, and their descendants.

"Originally the testator could not command—he could only entreat; but after the validity of *fidei-commis*sa was established, of course a testator might by positive words impose on his heir, a trust in favour of the objects of his bounty; some wills were made in that form, but in others the old precatory form was still adhered to; hence a question naturally arose, whether in the latter case, the words should be considered as imperative: Justinian settled this question, by ordaining that where the intention of the testator was clear, whether it were in direct or in precatory words, it should be equally effectual; and our law has conformed to this model.

"By the constitution of Justinian, where an estate had become vested in any one as heir, though there might be no evidence of any trust by writing or by witnesses, yet a person claiming to be a *fideicommissarius* (that is *cestui que trust*,) might put the heir to his oath, and unless he denied that the testator had communicated to him any trust, he was held to a trustee."

§ 8. Three things are said to be indispensable to constitute a valid trust; first, sufficient words to raise it; secondly, a definite subject; thirdly, a certain or ascertained object.<sup>(g)</sup> It will of course be understood that no valid Trust can be founded on any interest, the assignment of which is contrary to public policy, as for instance, an Officer's half pay, or a right to property depending on the issue of a suit then pending, &c. *Hill on Trustees* 4.

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(g) *Cruwys v. Colman*, 9 Ves. 322.

§ 9. No particular form of words is necessary. Words of direction, request, entreaty, recommendation, hope, are sufficient, provided they be imperative on the donee; nor, except as we shall presently mention, need there be any writing when the Statute of Frauds does not apply. If however it is left entirely in the discretion of the party to apply or not to apply the gift to the designated purpose, no trust will be created: *Hill on Trustees* 26. See also *Fox v. Fox*.<sup>(h)</sup> And it must be remembered that Judges now lean against construing words of recommendation as imperative, unless it be clear that they are intended to be used in a peremptory sense. *Hill on Trustees* 33.\*

§ 10. The subject of the Trust must be definite; so must its objects: therefore, when real and personal property were blended together, and the whole given to A, "in full confidence that she would devise the whole estate to such of the heirs of the Testator's father as she might think best deserved a preference," the Court could not say who were entitled. So where a lady in her life time indorsed a promissory note of £2000, and sent it to another lady in a letter, whereby she gave it to the latter for her sole use and benefit, for the express purpose of enabling her to present to either branch of the testatrix's family any portion of the principal, or interest thereon, as she might deem the most prudent; and in the event of her death, empowering her to dispose of the same by will or deed to those, or either branch of her family

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(h) 27 Beav. 301.

\* Where the title to property is proved to vest in a party by a written instrument, the Sudr Court at Madras have refused to recognize any Trust in derogation of such document, unless such Trust be declared in writing. S. A. 122 of 1856, Mad. S. R. of 1857, p. 14, and S. A. 58 of 1858, Mad. S. R. for 1858, p. 145. But I must submit with all deference to the Bench that this view of the law cannot be maintained. In the earlier suit there were other circumstances which might support the judgment. In the later case the judgment proceeds on the express ground that according to Hindu law the effect of a written instrument cannot be varied but by documentary evidence. But it is conceived that a Trust may always be shown in equity by parol evidence. Sir *John Peachey's case*, Sugd. Vend. and Pur. p. 910. To hold otherwise would be to hold out a direct premium for fraud. So where according English law the Statute of Frauds requires a writing, and a contract has been allowed to rest in confidence and in parol communication, Equity will enforce it against the party who seeks to shelter himself behind the provisions of the Statute. See *Ante*, p. 35, and *Lench v. Lench* Sugd. V. and P. p. 910.

she might consider most deserving thereof; and stating, that the indorsement was made to enable her to have the sole use and power thereof; it was held, that the letter created a trust, the objects of which were too indefinite to enable the Court to execute it; and that therefore the £2000 formed a part of the donor's personal estate.<sup>(i)</sup>

§ 11. The ordinary division of Trusts is into *Express* and *Implied*. It is unnecessary for us to consider trusts as *Executed* and *Executory* and the doctrines flowing therefrom. The first class, *Express*, is that which is created by the express words of the parties: the second, *Implied*, is that wherein the trust is deduced by the Law from the transaction, as matter of clear intention, though not to be found in the words of the parties; or which is engrafted upon the transaction by implication of Law, independent of any particular intention of the parties. Implied trusts are again divided into *Constructive* and *Resulting Trusts*.

§ 12. It is superfluous to say more on the subject of express trusts. Where their aim does not controvert the public policy of the Law, Equity will see that they are strictly and substantially carried out.

§ 13. "Implied trusts," says *Story*,<sup>(j)</sup>

"may be divided into two general classes; first, those which stand upon the presumed intention of the parties; secondly, those which are independent of any such intention, and are forced upon the conscience of the party by operation of Law, as, for example, in cases of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature."

§ 14. Thus where money is handed over by A to B, to be paid to C, there is an implied trust in favour of C even before he has given his assent; and should C refuse, B will be impliedly a trustee for A, to whom by implication there is a *resulting* trust of the money the moment the object for which it was delivered has failed. So where trusts in a will partially fall through, from their indefinite or illegal character; or, after full execution leave a residue; the Executor will hold such funds freed of the express trust, upon an implied *resulting*

(i) Stubbs and Sargon, 2 Keen, p. 255.

(j) Story, 1195.

trust in favour of the heirs, or personal representatives of the testator, as the case may be. So when a conveyance is made to a grantee without any consideration, and without any express trust stated, there arises an implied *resulting* trust in favour of the grantor. So where a man buys land in the name of another, and pays the consideration money, the grantee holds upon an implied resulting trust for him who paid for the property.

§ 15. But as this resulting trust arises only from a presumption of the purchaser's intention, it may be rebutted by any circumstances which raise a stronger counter presumption against such intention. The most ordinary case is that of a parent purchasing in the name of a child, when the same presumption does not arise as in the case of a conveyance taken in the name of a mere stranger; but a presumption arises, founded on the natural love and affection of the parent, and his moral obligation to provide for his offspring, that he intended the purchase to be for the advancement of the child. A very striking instance of a refutation of this last presumption of English law, arises in the case of a Hindu family, which being undivided, the presumption of a purchase made by a father in the name of one of his sons is, that it is a Benamee transaction, *not* for the benefit of such son, but for the *whole* family; and it is for the son asserting that he is beneficially entitled, to prove it. So in *Gopeekrist Gosain v. Gungapersaud Gosain*<sup>(k)</sup> the Lord Justice Knight Bruce in delivering the judgment of the Privy Council said;

"In this appeal two questions of importance arise, one of fact, material only to the particular parties to this litigation; the other of law, interesting, not only to them, but to society at large among the natives of *India*, at least among the natives of *Bengal*. The questions arise in this way: A wealthy native of the name of *Rogoram Gosain*, employed as a *Banian*, at *Calcutta*, and having also mercantile concerns of his own, made at different periods of his life purchases of immovable property in other names than his own; some of these purchases being made in the names of his sons, and some in the name of his son-in-law and of his brother. It is very much the habit in *India*, to

(k) 6 Moore's I. A. p. 53. It should be borne in mind however, that this is a Bengal, not a Madras case.

make purchases in the names of others, and from whatever cause or causes the practise may have arisen, it has existed for a series of years, and these transactions are known as '*Benamée* transactions;' they are noticed, at least, as early as the year 1778, in Mr. Justice *Hudc's* notes, where, in a case that came before him in that year, *Doe dem. Tilluck Seal v. Gour Hurry Day* (Morton's Dec. 249), the practice is thus mentioned: "In mere personal demands, such as *Bengal* bonds, the Courts have upon consideration determined that the action may be brought in the name of the person whose name is on the instrument, though it should be proved that he had no real interest in it. And the Court has so far complied with the very general practice in this country of using the names of other persons in mere personal demands, that in many cases the Plaintiff had recovered on notes not in his own name, but in some other name, giving evidence that the transaction was really his; such for instance, that the money lent was his, that he took the Bond in the name of another.' Then he speaks thus in reference to real estate: but it cannot be allowed to be both ways; in the case of a dispute of land, without directly contradicting those former decisions of the Court."

"In a much more recent case, which occurred in Sir *Edward Ryan's* time, *Maha Raneé Busnutt Comaree v. Bullobdeb* and others, reported in *Fulton*, 383, which report Sir *Edward Ryan* informs us is substantially accurate, it is said, "As far as the evidence goes, for there was no proof of the deed, the transaction is a simply *benamée* one, in the name of the complainant, but in truth for the benefit of *Rajah Ter Chunder*. It may be for religious purposes, but the question raised, whether the Court will recognise a *benamée* trusteeship, or a trust upon a trust does not arise. It being once established, then, that the transaction if '*benamée*,' the circumstance of the receipts being in the name of the complainant, proves nothing, that being in accordance with *benamée* usages. The complainant, therefore, has no title to call for the account, and the bill must be dismissed."

"Other cases were mentioned in the course of the argument, which came before the *Sudder* and other Courts, to the same effect. The law upon this subject was recognised by the Judicial Committee, in 1843, in the case of *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* (3 Moore's Ind. App. Cases, 229) where Lord *Campbell*, in delivering the opinion of the Court, at page 240, says, 'We have heard from the highest authority, from the authority of Sir *Edward East* and Sir *Edward Ryan* (whose most valuable assistance we have in this case, and it gives me a confidence that I should not otherwise have felt), that the criterion in these cases in *India* is to consider from what source

See also  
p. 250  
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the money comes with which the purchase-money is paid. Here there has been no evidence given that the Appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore, I think, that so far on this part of the case no difficulty can be entertained, and that the whole of the property must be considered as joint property."

"It is clear, and their Lordships are confirmed by the opinion of Sir *Edward Ryan*, that the knowledge and assent of the person in whose name the purchase is made is immaterial: to repeat the language of Lord *Campbell*, the criterion is, the quarter from which the money comes, and in the greater number of instances of *benamée* purchases they are made in the names of persons ignorant at the time of their being so made. In the present instance there is no question but that all the money was provided by *Rogoram Gosain*; that is indisputable. I do not allude now to whether the money was the joint property of *Rogoram Gosain* and his brother. It is clear it was not the money of the individual in whose name the purchase was effected. If then the person in whose name the purchase was effected had been a stranger in blood, or only a distant relative, no question could have arisen; he would have been *primā facie* a trustee, and if he desired to contend that the *primā facie* character of the transaction was not its real character, the burthen would have rested on him; but the individual in whose name the present purchase was effected was the son, and at that time the only son, of the person who made the purchase, and whose money it was, and it has been contended that that circumstance changes the presumption; and that what would be the presumption in the case of a stranger does not exist between father and son; that the presumption is advancement, and that, therefore, the burthen of proof is shifted. Now, on this, as far as their Lordships can learn, there is no authority in Indian law, no distinct case, or *dictum*, establishing or recognising such a principle, or such a rule. It is clear that in the case of a stranger the presumption is in favour of its being a *benamée* transaction, that is a trust; but it is clear also that in this country, where the persons in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different; and it is said that that ought to be deemed the law of *India* also, not because it is the law of *England*, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of *India*. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be, that a man may wish to

provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject; among others, a man may object to making his child independent of him in his lifetime, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in *India* there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one; but if the objection exists, it does not become less where there is only one son, for the father may have others, and in such a case the same objectionable consequence would follow as where several sons were in being. The note on this subject is clearly stated in *W. H. Macnaghten's 'Principles of Hindu Law,'* which we learn from Sir *Edward Ryan* is cited as an authority in the Courts of *Bengal*. In the first volume, p. 2, he says, 'The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle, that is, by the death of the owner (natural or civil), or his voluntary abandonment. In ancestral real property the right is always limited, and the sons, grandsons, and greatgrandsons of the occupant, supposing them to be free from those defects, mental or corporal, which are held to defeat the right of inheritance, are declared to possess an interest in such property equal to that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another. With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility. The property of the father being thus restricted in respect of ancestral real property, and Wills and Testaments being wholly unknown to the Hindoo law, it follows, for the sake of consistency, that they must be set aside, where they are at variance with

the law ; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime. A Will is nothing more or less than the legal declaration of a man's intentions, which he wills to be performed after his death ; but willing to do that which the law has prohibited, cannot be held to be a legal declaration of a man's intentions. There may be a gift in contemplation of death, but a Will in the sense in which it is understood in the English law, is wholly unknown to the Hindoo system ; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may be done *inter vivos* may not be done by Will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of *Bengal* be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another, without sufficient cause. This has been declared in the *Dáyabhaga* to be a precept not a positive law ; and it is therein laid down, that a gift or transfer under such circumstances is not null ; for a fact cannot be altered by a hundred texts. There is nothing inconsistent in this, as the doctrine is rather confirmatory of the text, which declares the absolute nature of the father's power over such property ; but it has been held to extend to the legalising of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right though morally objectionable.'"

"It is their Lordship's opinion, therefore, that notwithstanding the Respondent was the only son of *Rogoram Gosain* when the purchase was made, the objection in point of morality and of religion was a circumstance of conduct so strong, according to Hindoo principles, that it is not lightly to be assumed ; it forms an objection against importing into the Hindoo law that rule of positive law which exists in *England*. I have omitted to observe that *benamée* purchases in the names of children, without any intention of advancement, are frequent

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in India; that is recognised in many cases, and, among others, in that of *Amaree Tewaree v. Rai Rughoo Bun Sukai* (3 Ben. Sud. Dew. Rep. 366), where may be found this statement: 'The present case does not appear to be at all of a nature with those *benamtee* transactions which are prohibited by the Regulations, as *Sheo Sukai*, in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country, against which the prohibitory enactment was never intended to apply.'

"Their Lordships are, therefore, satisfied, that according to the law by which this case must be governed, the presumption in favour of its being a *benamtee* transaction is different from that which would have existed by the law of *England*."

§ 16. "The same doctrine" (of implied trust) writes *Story*<sup>(l)</sup> "applies to the case of securities taken in the name of a child. The presumption is, that it is intended as an advancement, unless the contrary is established in evidence. And the like presumption exists in the case of a purchase of a husband in the name of his wife, and of securities taken in her name. Indeed the presumption is stronger in the case of a wife than of a child; for she cannot at Law be the trustee of her husband. The same rule applies to the case of a joint purchase by the husband in the name of himself, his wife, and his daughters; and it will be presumed an advancement and provision for the wife and his daughter; and the husband and wife will be held to take one moiety by entireties, and the daughter to take the other moiety."

§ 17. In the cases of joint purchases made by two persons, writes *Story*<sup>(m)</sup>

"who advance and pay the purchase-money in equal proportions and take a conveyance to them and their heirs, it constitutes a joint tenancy, that is, a purchase by them jointly of the chance of survivorship, and of course the survivor will take the whole estate. This is the rule at law; and it prevails also in Equity under the same circumstances, for, unless there are controlling circumstances, Equity follows the law. But wherever such circumstances occur, Courts of Equity will lay hold of them to prevent a survivorship, and create a trust, for joint-tenancy is not favoured in Equity.<sup>(n)</sup>"

(l) Eq. Jur. §. 1204.

(m) § 1206.

(n) An instance of this anxiety on the part of Equity to lay hold of circumstances which will out down the presumption of a joint-tenancy, and so defeat survivorship, is to be found in the recent case of *Robinson v. Preston*: 27 Law Jour. Ch. 335. Where stock had been purchased in the joint names of two, out of money standing to them

Thus, if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase-money, he will be entitled to his share as a resulting trust. So, if two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, the survivor shall not have the whole money due on the mortgage; but the representative of the deceased party shall have his proportion, as a trust; for the nature of the transaction, as a loan of money, repels the presumption of an intention to hold the mortgage as a joint-tenancy. So, if two persons jointly purchase an estate, and pay unequal proportion of the purchase money, and take the conveyance in their joint names, in case of the death of either of them there will be no survivorship; for the very circumstance that they have paid the money in unequal proportions excludes any presumption that they intended to bargain for the chance of survivorship. They are therefore deemed to purchase as in the nature of partners, and to intend to hold the estate in proportions to the sums which each has advanced."

§ 18. Many other cases are stated in the books in which the Law raises an implied trust: they are not likely to occur in practice in this country; and it will only be necessary here to remind the reader of those numerous cases of constructive or actual fraud, already considered, of overreaching imposition, mistake, and the like, in which Equity will not permit the guilty party to benefit by his own cunning or misconduct; but will fix on him an implied trust in favour of the party righteously entitled to the property which such fraud, &c. affects.\*

§ 19. As a Trust is a relation of confidence, and a gratuitous office generally speaking, no man can be compelled to

*joint account in the bank it was held that the stock was not necessarily to be held in Equity as held in joint-tenancy, but that the origin of the money and the acts and intentions of the parties might be looked at, and a conclusion in favour of a tenancy in common drawn from the circumstances. "The circumstances" said V. C. Page Ward "here are; first, the source from which the purchase money was derived, which was real estate held in common. Secondly, when they come to execute a deed, they expressly declared themselves entitled as tenants in common. The third point is perhaps the strongest of all viz., that the lady who ultimately became the survivor, in her will, not only speaks of her share of the property and affects to dispose of it in favour of her sister charged with her debts; but further than that, she says that after the death of both, certain payments are to be made into the names of Trustees. These three circumstances concurring have a force which any one of them separately might not perhaps have had."*

\* See Ante Topic XVII.

become a trustee at the nomination of another ; he should in prudence formally disclaim, but his disclaimer may be gathered from his acts.

§ 20. If he accepts, he may either do so by express formal declaration, or by proceeding to act in the trust : a man may make himself a Trustee *de son tort* by acting as a Trustee, when he has not been appointed. Where he has accepted, he cannot capriciously throw up his trust at any moment that it may suit his interest or convenience. An instance of this will be found in the case of *Syed Hamed v. Kera-koose*, quoted in my work on Evidence.

§ 21. The following are the properties of the office of a Trustee. 1. A Trustee having once accepted, cannot afterwards capriciously renounce his Trust. 2. He cannot delegate it. 3. In the case of co-trustees, the office must be exercised by all the trustees jointly. 4. On the death of one trustee, the trust will survive. 5. One trustee (acting *bonâ fide*) shall not be liable for the acts of his co-trustee. 6. A trustee shall derive no emolument from the office.

§ 22. A Trustee after acting, cannot renounce at his own option. He may be discharged by a Court of Equity, or by virtue of an express provision for the appointment of new trustees in the deed, or will ; or by the universal consent of the parties interested in the estate. So in *Doyle v. Blake* <sup>(o)</sup> Lord Redesdale said :—

“Executors must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the effects themselves, or by putting the administration into the hands of a Court of Equity.”

§ 23. But advantage cannot be taken of a power of new appointment for the purpose of fraud ; and therefore if a trustee will not countenance, or participate in, a breach of trust himself, as when the wife is importunate that her husband should be accommodated out of the trust funds of her marriage settlement, but is nevertheless willing to retire, in order that some one less scrupulous than himself may be appointed,

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(o) 2 Sch. & Lef. 231.

he will not thereby escape his responsibility. The maxim *qui facit per alium facit per se* applies. So in *Pearse v. Pearse*(*q*) where a retiring trustee, in the expectation that a new trustee would be appointed, but such appointment was never made, executed a transfer, of the trust funds into the name of the new trustee, who allowed a breach of trust to be committed, it was held that the retiring trustee was liable for the breach of trust.

§ 24. A Trustee cannot delegate his office, without express authority so to do in the Trust Deed; for the privity between him and the author of the Trust is one of confidence; and *delegatus non potest delegare*. Therefore, if he trusts the execution of his duty to a stranger, or his attorney, he will be liable personally for any loss that may happen.

So in *Kilbee v. Sneyd*,(*r*) when it was urged that the Executor was liable for the default of his servant, Sir A. Hart said:—

“That is the rule. It is hard occasionally, where the executor has acted with good faith; but it is established, and it is beneficial in general. The rule, however, is governed by circumstances; and if a testator points out an agent to be employed by the executor, I think if such employé received a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money. But the excuse of reasonable diligence is still required. The effect of a recommendation is to discharge executors to the extent of selecting, but still the person recommended is the agent of the executors, and they are bound to use diligence in looking after him: the question then becomes one of wilful default, not concluding the executor by the mere fact of loss arising from such employé: nor does the diligence which is required demand that he should institute a suit against the agent, but only that he should have been vigilant, and have called upon him to account: he may be able to show some discreet and reasonable ground for not having sued him.”

§ 25. This rule does not apply to the employment of an Agent for carrying out mere ministerial acts when the Trustee retains the supervision and control over the person so employ-

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(*q*) 2 Jur. n. s. 843.

(*r*) 2. Moll. 199.

ed. *Hill on Trustees* 560. And on this principle and to this qualified extent the Trustee may delegate when there is a necessity for so doing *cessante ratione cessat lex*.

"There are" said Lord *Hardwick* in *Ex parte Belchier*,<sup>(a)</sup> "two sorts of necessity; first, legal necessity; and, secondly, moral necessity. As to the first, a distinction prevails. Where two executors join in giving a discharge for money, and one of them receives it, they are both answerable for it; because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. Moral necessity is from the usage of mankind; if the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as if a trustee appoint rent to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable: so in the employment of stewards and agents; for none of these cases are on account of necessity, but because the persons acted in the usual method of business." And Lord *Loughborough*, writes *Mr. Lewin*,<sup>(b)</sup> in very similar terms observed, "If the business was transacted in the ordinary manner, unless there were some circumstance to create suspicion, surely the allowance is fair." "Necessity" said Lord *Cottenham*, "which includes the regular course of business, will exonerate." And Lord *Redesdale* in the same spirit observed: "An executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts: he is considered to do this of necessity: he could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in India and another in England, the assets being in India but to be applied in England: there the co-executor is appointed for the purpose of carrying on such transaction, and the executor is not responsible: for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence."

The judgment of Lord *Cottenham* referred to by *Mr. Lewin* is in the case of *Clough v. Bond*,<sup>(u)</sup> and sums up in luminous terms the whole law in this part of the subject. It is worthy

(a) *Ambl.* 219.

(b) *On Trusts*, p. 231.

(u) 3 M. and C. R. 496-7.

of all consideration at the hands of parties taking upon themselves fiduciary responsibilities.

"It will be found," says His Lordship, "to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable; *Phillips v. Phillips*; or if he leave money due upon personal security, which, though good at the time, afterwards fails; *Powell v. Evans*, *Tebbs v. Carpenter*. And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorised fund. Thus, he is not liable, upon a proper investment in the 3 per cents., for loss occasioned by the fluctuations of that fund; *Pest v. Crane*; but he is for the fluctuations of any unauthorised fund; *Hancom v. Allen*, *Howe v. Earl of Dartmouth*. So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator; *Longford v. Gascoyne*, *Lord Shipbrook v. Lord Hinchinbrook*, *Underwood v. Stevens*."

It will be seen therefore that though he cannot delegate his entire trust by abdicating his functions, he may employ all proper agents, as bailiffs, collectors, and the like; for this is implied in his authority. *Quando mandatur aliquid, mandatur et omne per quod pervenitur ad illud*. Again; *Omne majus continet in se minus*. And; *Cui licet quod majus, non debet quod minus est, non licere*.

§ 26. Where the Trust is vested in co-trustees, they all form one collective officer, and all must join in the execution of the duties of the office, unless the trust Instrument contains express directions for the administration of the trust according to the decision of the majority of the Trustees. *Hill on Trustees* 298. There is an exception moreover in the case of trustees of a public character, as in cases of charitable and public trusts, where the majority will bind the minority. *Perry v. Shipway*; <sup>(v)</sup> and every executor and administrator has a full controul over the personal estate, independent of his co-executors and administrators, nevertheless it is the duty of each to watch over : and if necessary, to correct the conduct of the other. *Steles v. Grey* <sup>(w)</sup> : and if a co-trustee or co-executor enables a person to receive money, and he pays it to the co-executor who misapplies it, the co-executor who enabled the party so to receive and pay over the funds, will be liable ; *Cowell. v. Gatcombe*. <sup>(x)</sup>

§ 27. A bare authority committed to several persons is determined by the death of one ; but if coupled with an interest, it survives. Therefore the office of Trustee survives ; otherwise the more precaution a man took to secure the execution of the trust by increasing the number of the trustees, the more he would increase the risk of defeating his own intentions.

§ 28. One trustee, in the absence of fraud, is not liable for the acts or defaults of his co-trustee, whether there be a proviso to that effect or not in the original instrument. The leading case upon this is the old one of *Townley v. Sherborne*. <sup>(y)</sup>

There, “ A, B, C and D were trustees of some leasehold premises. A and B collected the rents during the first year and a half and signed acquittances ; but from that period the rents were uniformly received by an assign of C. The liability of A and B during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands ? ” “ The Lord Keeper Coventry ” (says the reporter) “ considered the case to be of great consequence, and thought not to determine the same suddenly, but to advise thereof, and desired

(v) 5 Jur. n. s. 535 and 1015.

(w) 19 Law J. ch. 185.

(x) 27 Beav. 568.

(y) Bridgman, p. 85.

the Lords the Judges Assistant to take the same into their serious consideration, whereby some course might be settled that parties trustees might not be too much punished, that it should dishearten men to take any trust, which would be inconvenient on the one side, nor that too much liberty should be given to parties trustees, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on their side. And the Lord Keeper and the Lords the Judges Assistant afterwards conferring together, and upon mature deliberation conceiving the Case to be of great importance, his Lordship was pleased to call unto him also Mr. Justice *Crook* Mr. Justice *Baroley*, and Mr. Justice *Crawley*, for their assistance also, in the same, and appointed precedents to be looked over as well in the Court of Chancery as in other Courts, if any could be found touching the points in question; whereupon several precedents were produced before them, some in the Court of Chancery and some in the Court of Wards, where parties trustees were chargeable only according to their several and respective receipts, and not one to answer for the other, but no precedent to the contrary was produced to them. Whereupon his Lordship, after long and mature deliberation on the Case, and serious advice with all the said Judges, did this day in open Court declare the resolution of his Lordship and the said Judges—That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud or evil dealing appear to have been in them to prejudice the trust; for, they being by law may receive either all or as much of the profits as he can come by. And it being the case of most men in those days that their personal estate do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate to make up the same, either by the sale or the preception of the profits thereof; and if such of their friends who carry themselves without fraud should be chargeable out of their own estate for the faults and deficiencies of their co-trustees who were not nominated by them, few men would undertake any such trust. And if two executors be, and one of them wastes all or any part of the estate, the devastavit shall by law charge him only, and not the co-executor, and in that case *equitas sequitur legem*, there being many precedents resolved in Chancery, that one executor shall not answer nor be chargeable for the act or default of his companion. And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands and



are put in trust out of other respects than to be troubled with the receipt of the profits. And albeit, in all presumption, this case had often happened, yet no precedent had been produced to his Lordship or the Judges, that in any such case the co-trustee had been charged for the act or default of his companion; and therefore it was to be presumed that the current and clear opinion had gone that he was not to be charged, it having not till of late been brought into question in a case that by all likelihood had often happened. But his Lordship and the said Judges did resolve, that, if upon the proof or circumstances the Court should be satisfied that there had been any *dolus* or *malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive 'the whole profits, he should be charged though he received nothing.'"

§ 29. A Trustee who signs a receipt for mere conformity's sake shall not be answerable for the misapplication of the fund by the trustee who receives, provided such receipt by one is justified by the circumstances. So in *Fryer v. Martindale*,<sup>(2)</sup> where the Testator gave leasehold property to three trustees for sale, and to hold the produce as part of his residuary estate, and appointed the same three trustees his executors. After his decease the three trustees sold the trust premises in their character of trustees, and all joined in the execution of the conveyance and of the receipt for the purchase money. The whole of the purchase money was in fact received by one of the trustees, who was a solicitor, and acted in that capacity to the trust, and who had died insolvent. P was the survivor of the three trustees. The plaintiff M. was a legatee of 300*l.*, which was by the will directed to be separately invested and paid to M. by the trustees at twenty-one. Sir W. P. Wood, V. C. said:—

"Looking to the recent cases, I cannot help seeing, that, even in the case of executors, the old rule has been a good deal modified; and that the bare circumstance of an executor joining in a sale will not preclude him from showing that he did so for the sake of conformity; although he has a stronger case to make out than trustees, who will, in the absence of other circumstances, be taken to have joined out of conformity, and the onus of proving the contrary is thrown on the person seeking to charge such a trustee. In the case where three trustees join,

(2) 21 Jur. 485.

if it can be shown that one alone received the money, it is at once clear that the others could only have joined for conformity's sake. There is no longer any case of possession of trust funds by that trustee. It is true, that if he leaves the money too long in the hands of a single trustee, then another head of equity arises, viz. laches, and neglect of his duty in providing for the safe custody of the fund. In this case it is found by the chief clerk's certificate, that the premises were given to the three as trustees upon trust to sell; that the three did contract to sell and sold as trustees. Then it is alleged (but it does not appear on the certificate) that one alone of the trustees, acting as the solicitor of the trust, was allowed to receive the fund. That would clearly be perfectly regular; and as to charging *Picquot* for wilful default, no such case is alleged in the pleadings. I must, therefore, hold him not liable."

§ 30. But he must not let the fund lie in the hands of the receiving trustee. In *Brice v. Stokes*,<sup>(a)</sup> the leading case on this subject, *Mooring* and *Fielder*, two trustees with a power of sale, conveyed the estate in 1784 to a purchaser, and both signed the receipt, but *Fielder* alone actually received. In 1794 *Fielder* died insolvent without having accounted for the money paid to him, and it was proved in evidence that *Mooring* was conusant of the misemployment of the fund, though he took no active measures for recovering it out of *Fielder's* hands. Lord *Eldon* said:—

Though a trustee is safe if he does no more than authorise the receipt and retainer of the money so far as the act is within the due execution of the trust, yet if it is proved that a trustee, under a duty to see his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, admits that, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it or lent it in opposition to the trust, and the other trustee permits that for ten years together, the question then turns upon this, not whether the receipt of the money was right, but whether the use of it subsequent to that receipt was right, after the knowledge of the trustee that it had got into a course of abuse. As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it."

*Mooring* was made answerable.

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(a) 11 Ves. 319.

§ 31. If one trustee have notice of a breach of trust by his co-trustee and conceal it, or do not take active steps to protect the interest of his *cestui qui trust*, he will be himself responsible. Where a breach of trust is threatened, he must prevent it, if necessary, by injunction ; where it has been already committed, he must take all necessary and prudent steps, even by a suit if expedient, to procure the restoration of the trust fund to its original condition.

§ 32. A Trustee is entitled to no emolument or remuneration ; for the office is not only fiduciary, but gratuitous. The Leading case is that of *Pett v. Robinson* which will be found in *Tudor and White's L. C.* vol. 2, p. 206. We have already considered the rule that persons in a fiduciary character shall not purchase from, or make a profit by, their relation.<sup>(b)</sup>

Thus an Executor shall receive no compensation though he may have carried on a business by the directions of his testator : nor for carrying on the business of his deceased partner : nor shall he make a profit out of his trust by his own professional business : as in the case of an Attorney. The Chairman or a Director of a Company cannot derive profit beyond his salary. A mortgagee is a trustee for the mortgagor : and on sale shall recover nothing beyond the principal and interest of his debt. A trustee ought not to be appointed a receiver with a salary or commission, for he thus makes a profit out of the estate. So in *Kerakoose v. Serle*,<sup>(c)</sup> the order of the Supreme Court empowering the Registrar to act as next friend in infant suits was disallowed, because of the possibility of his making money by his fees out of such suit.

§ 33. A trustee may expressly contract with the author of the trust for compensation, but the Court will watch such a bargain with jealousy.

§ 34. But a trustee is entitled to be reimbursed his expenses out of pocket, and therefore where an attorney is trustee,

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(b) See Ante, p. 238 ; and See *Bentley v. Craven* ; 18 Beav. p. 75. A trustee cannot purchase the Trust property.

(c) 4 Moores P. C. C. 459.

although he cannot charge for his time, trouble, or attendance, he may for his actual disbursements.<sup>(d)</sup>

§ 35. When a Trustee makes profits with the Trust funds, the profit belongs to the *cestui qui trust*. So in *Sugden v. Crosland*<sup>(e)</sup> where a testator appointed two trustees and executors of his will, but by a codicil he excluded them and appointed two other persons. One of these retired in consideration of £75, paid to him by one of the excluded trustees, and executed a deed appointing the excluded trustee to act as trustee in his room. The Court directed the new trustee to be removed, and the deed to be cancelled; declared the conveyance to be void; and directed the £75 to form part of the assets. The Court also held that profit derived by a trustee, either from the trust property or from his office of trustee, belongs to the *cestui qui trust*.

And the *cestui qui trust* may elect to have the profits instead of interest. The leading case of *Docker v. Somer* has already been considered.<sup>(f)</sup>

§ 36. Where a trustee keeps in his own hands funds which he ought to have invested, though he makes no profit, he will be liable to be charged interest. There is a great difference between *negligence* and corruption. In England special facts are required to charge, in such a case, more than 4 per cent. Here, where the rates of interest are so much higher, a Court might probably feel itself justified in awarding a far higher rate according to circumstances.

§ 37. And if he *uses* the trust fund he may be liable to be charged compound interest. So in *Townsend v. Townsend*,<sup>(g)</sup> where by indenture, dated the 1st January, 1839, being articles of partnership, it was provided that the capital of the partners

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(d) Those who wish to pursue this subject further are referred to *Cradock v. Piper*, 14 Jur. p. 97. *Lincoln v. Windsor*, 15th Jur. 765. Articles in the 2nd part of 15th Jur. p. 362, and of the 2nd part of *Jurist* for the year 1852 p. 242. 2nd part of *Jurist* for the year 1857, p. 509, and See *Lord v. Whightwick*, 23. L. J. Ch. p. 235.

(e) 3. Sm. & G. 192.

(f) See Ante p. 284.

(g) 3. Jur. n. s. p. 506.

should not be withdrawn until the expiration of seven years from that date, and in case of the death of one of the partners within that term, that a valuation of his share should be made, and the surviving partners should pay to his representatives the amount of such valuation within three years from the said term of seven years, and in the meantime give sufficient security for the same by a mortgage of a competent part of the partnership property. It was also provided that it should not be lawful for the representatives to commence any action for recovering payment of the share until the end of three years after the expiration of the term of ten years, nor to claim any participation in the profits made after the day up to which the valuation was made, the expressed intention being, that the representatives of the partner so dying should take 5*l.* per cent. on the value of the share in lieu of profits. It was provided, however, that nothing should prejudice the right of the representatives, within the term of seven years, to take any proceedings in order to obtain a fair valuation, or to obtain and enforce the mortgage security. In April, 1844, *W. T.*, one of the partners, died, having by will devised his real and personal estate, nearly all of which was assets of the partnership, to three trustees and executors, the defendants *R.*, *E.*, and *I. H.*, two of whom (*R.* and *E.*) were his brothers and co-partners, upon trust to raise the sum of 12,000*l.*, and invest the same in Government or real security, or in some Railway Company, and apply the proceeds towards the maintenance and education of the plaintiff, his then infant daughter, and accumulate the surplus at compound interest; and upon his daughter attaining twenty-one, to pay the same to her separate use, and to stand possessed of the capital on trust to pay her the proceeds during her life, to her sole and separate use. In December, 1844, a valuation was made, by which the testator's share was ascertained to be 20,000*l.* and upwards. After more than ten years had expired from the date of the articles, in June, 1853, certain hereditaments, consisting of freeholds, leaseholds, and machinery, being part of the partnership assets, were, in alleged consideration of 12,000*l.*, conveyed by the defendant *E.* to the defendants *R.* and *I. H.* by way of mortgage, subject to a pro-

viso for redemption. The plaintiff came of age in 1857, and in 1858 the defendants *R.* and *E.* rendered to her an account of the trust funds, in which they debited her with various items of expenditure for maintenance and education, with 5*l.* per cent. interest thereon, and credited her with the sum of 12,000*l.*, and interest at 5*l.* per cent. with yearly rests, up to the first May, 1853, and thenceforth with the interest at 4*l.* per cent., with yearly rests. The prayer of the bill was for an inquiry and account of the profits made in the partnership business on the sum of 12,000*l.* from the testator's death, and for payment of what should be found due to the plaintiff, alleging that the mortgage was an improper security. And the Court held that the plaintiff was entitled to an account of the legacy of 12,000*l.*, with interest at 5*l.* per cent. from one year after the testator's death up to the 1st January, 1849, with compound interest on the surplus, after allowing for sums expended for her maintenance and education; and that the plaintiff was entitled to an account of the profits made by the partners from the 1st January, 1849, on the balance found due for principle at that date, with interest at 5*l.* per cent., and annual rests, with a decree for payment of what should be so found due.

§ 38. The principle of charging interest against a trustee who has not invested, but kept the trust funds in his own hands, was considered in the case of *the Attorney General v. Alford*.<sup>(h)</sup>

Lord *Cranworth* said:—

“First of all, it is a question of fact what conclusion I am to come to as to the conduct of this gentleman in point of facts; and, secondly, what are the principles which regulate this Court in dealing with executors and trustees having money in their hands which they ought to invest, and do not invest; what is the mode in which it is to deal with them in respect of interest—whether at 4*l.* or 5*l.* per cent., or compound interest at 5*l.* per cent., or, under some circumstances, to make them liable for the amount of Consols which would have been forthcoming if they had invested it properly. Now, I have ever since I was first at the bar always felt that to be one of the most unintelligible questions possible: there is no defining the rule. *Prima facie*,

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(h) 1 Jur. n. s. p. 361, and See Ante p. 233.

every executor and trustee who holds money in his hands is chargeable with having that money forthcoming, and to be charged with interest at 4l. per cent. : almost always to be charged with interest, because it must be presumed he made interest ; and the interest of the Court, as it is called, is 4l. per cent., which was a sort of medium in former times between that which vigilant and sluggish persons got. The former got 5l. per cent., and the latter got 3l., and this Court has always treated 4l. per cent. as the interest to be charged. That being so, the Court has in latter days rather more broken in upon that principle since I ceased to be a practitioner in the Court than it did previously. Although it did so to some extent while I was a practitioner, it has gradually crept in to charge executors with 5l. per cent., sometimes with compound interest. That is comparatively very modern, because, as I remarked at the time the matter was argued here, the case of *Raphael v. Boehm*, which was before Lord Eldon, always left a great impression upon my mind when he said it was the first instance of the kind he had ever seen, and he hoped it would be the last—meaning, I suppose, that it was a harsh and not a justifiable mode of dealing. I will state shortly why I confess I do not quite understand the principle upon which the Court proceeds in these cases. I do not know that I shall not be able, nevertheless, satisfactorily to come to the conclusion I do in the present case. But I do not quite understand, I admit, the grounds on which the Courts have proceeded. You will find it stated in many of the cases that it is done in penam to punish the executor. What is the meaning of that—to punish the executor? Why not punish him by making him account for more principal than he has received, if you punish him by making him account for more interest than he has received? What the Court ought to do, I think, is to charge him only with that which he has received, or that which it is justly entitled to say he ought to have received, or which it is justifiably entitled to say we think he did receive. Either it was proved that he did, or he is estopped from saying he did not. I do not think there is any other intelligible ground for charging an executor with more interest than he has made than one of those propositions. If it is not misconduct which warrants you in coming to the conclusion that, in point of fact, he did receive, or is estopped from saying he did not receive, it does not seem to me to be a ground for charging him with anything he did not receive, if it is not misconduct contributing to that particular result.”

§ 39. But where the breach is committed with the knowledge and sanction of the *cestui qui trust*, who has derived the benefit of the transaction, it does not lie in his mouth to charge

his trustee with any subsequent loss. So in *Griffiths v. Porter*<sup>(i)</sup> it was decided that

"The Court will not visit a trustee with the consequences of a breach of trust committed with the sanction or by the desire of the *cestui qui trust*, or of one committed without such sanction or desire it, when it comes to the knowledge of the *cestui qui trust*, he has acquiesced in and obtained the benefit of it for a long period."

§ 40. His expenses mean his reasonable and necessary expenses. Thus he is generally entitled to his costs of legal proceedings, when they are not occasioned by his own misconduct.

§ 41. By the Indian Administrator General's Act, VII of 1849, Sec: 58, the old charge of 5 per cent., which Indian executors had customarily been allowed for their trouble, is taken away.

§ 42. Where the fund is outstanding, as a debt, a trustee must be diligent in getting it in; for the first duty of a trustee is to place the trust property in a state of security; and he will be personally responsible for any loss which happens through his own negligence. Thus, in *Tebbs v. Carpenter*,<sup>(j)</sup> a testator had directed the money arising from his rent to be invested by his executors in the 3 per cent annuities, for the purpose of accumulation. Arrears were incurred to the amount of 1500*l.*, and from the tenor of the Master's report, it was evident, that, by the employment of proper means, the whole of the arrears might have been recovered. The executors produced no evidence in justification of their conduct. Sir *Thomas Plumer* said:—

"I am anxious not to discourage persons from acting as executors by throwing difficulties in their way, and I am willing to make every proper allowance; but, I must not forget the established doctrine of this Court. If persons accept the trust of executors, they must perform it; they must use due diligence, but not suffer infants to be injured by their negligence. If there be *crassa negligentia*, and a loss sustained by the estate, it falls upon the executors. Here for want of evidence, I cannot say that all this rent could not have been recovered; and I am reluctantly obliged to assume that no exculpatory evidence could be uproduced, and therefore they must be charged with these arrears. Interest upon the arrears was but faintly pressed for, and ought not to be given."

(i) 25 Beav. 236.

(j) 1 Mad. 290.



§ 43. He must not leave out the fund upon personal security. He must place it in some responsible bank; but not to his own credit, nor must he use, or mix it with his own funds. Thus in *Massey v. Banner*<sup>(k)</sup> where A and B were trustees for creditors, and C acted for them in collecting the debtor's estate, and paid the assets into a bank to his own account, and, on the failure of the bank, A and B filed a bill against C to compel him to account for the loss, Lord *Eldon* said:—

“C is liable in the same manner as other persons acting as trustees, executors, receivers, or assignees; and the principle applying to all these classes of persons is properly expressed in these terms—That the court does not expect them to take more care of the property entrusted to them than they would do of their own. If a receiver of the Court undertake to receive rents in the country he cannot send them in cash, and if he collect them in paper, taking the same care with respect to it as a reasonable attention to his own affairs would dictate to him if it was for himself, if he remits what he has collected by the best bills he can find by the same means that would be reasonable if it were on his own account, then I should say that it would be very difficult to charge him, for he has done the best he could for his employers. But I cannot persuade myself that the principle is satisfied, unless the result is as beneficial to them as it would be to himself. If an assignee pay money into his banker's hands as money belonging to the estate, and the banker fails, the assignee is undoubtedly clear from the loss; but if instead of distinguishing it, he pays it all into his own account, then it is his account there, there is nothing like a declaration of trust of it, and it is familiar to consider him as having it in the banker's hands for himself, making him liable for it, and charging him with interest at the rate (since the late statute) of 20 $\frac{1}{2}$  per cent. This is because, if he had become bankrupt, it would have gone to the credit of his estate; for it is clear in that case, that, if the bankers had any account with him by way of set-off, that set-off would affect equally his money and the money of the estate paid into his account; they have no notice that it belongs to the estate: the account is between him and them. The same has been the case with executors and trustees, and I apprehend, that, for the safety of mankind, the principle must be, that, if you desire to deal for me as you would for yourself, it must be so that the dealing for me, if unfortunate, shall not be more so to me than it would have been to you, if it had been for yourself. In the case of assignee, if

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(k) 4 Mad. p. 413.

he fails his estate as all the benefit of the money: the parties for whom he acts have none: he does not therefore deal for them as he would for himself. Now, what is this case? There seems to have been the same course of dealing between C and the bankers from his beginning to act as collector down to the bankruptcy, as there was previous to the commencement of his agency: the whole account is kept with himself, and though he did not draw during the latter part of the period, yet he might have drawn as freely as before: the account stood in the same way, and it seems to me that he had the same authority and control over it. See what the consequence is: if he had paid the sums in question to the account of the trust estate, and the bankers had then become bankrupts, undoubtedly the trustees would have been entitled to prove the sum against them. Even now that it is standing in his name, the trustees might be entitled to prove it by his confession that it belonged to the trust estate; and then they would be in the same situation. But this will not be a ground for discharging him, unless it be laid down that the liability of a trustee shall depend on his being solvent; for, if he were capable of becoming a bankrupt, his assignees would take the debt due from the bankers, or if he were to die insolvent, it would be part of his assets; and, either case, the trust estate would not have the benefit of the proof." His Lordship therefore held that C was "responsible."

§ 44. He should invest in the manner and security specified in the instrument creating the Trust. Where no express provision is made for investment, he must invest in public securities, or perhaps upon safe mortgage of immoveable property, when the security is ample under special circumstances. It is not however advisable to do so except under direction of a Court. He must not let the fund be employed in trade, or lend it temporarily on personal security, as not unfrequently happens when trustees of marriage-settlements allow their good nature to prevail over their judgment, and accommodate the husband at the intercession of the wife. He may compound or release debts provided he do so prudently. So in *Forshaw v. Higginson*.<sup>(1)</sup>

"A trustee, who, acting in the bonâ fide exercise of his discretion,

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(1) 21 Jur. 476. Those who wish to pursue this further are referred to 2nd part of 16th Jurist, p. 386, and 2nd part of 17th Jurist, p. 2, and see *Loak v. Lomas*, 16 Jur. p. 813.

makes a payment which, though not authorised by the terms of the trust, is in his opinion necessary to enable him to execute the trust, will be allowed such payment in passing his accounts; though he does not act prudently in assuming the responsibility of making such a payment without the sanction of the Court."

§ 45. Nor, in the absence of fraud or laches, will he be answerable for more of a debt than he can get in and has received. So in *Doorga Persad Roy Choudry v. Tara Persad Roy Choudry*<sup>(m)</sup> where A sued B, a debtor of his, intestate, upon a bond debt, and obtained a decree against him for the amount. B appealed from this decree to the *Sudder Court*. By a deed of arrangement entered into by A and C, after the commencement of the suit, C became entitled to a six anna share of the debt. Pending the appeal to the *Sudder Court*, A entered into a compromise with B, postponing the payment of the amount recovered by the decree, for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of C. B failed to pay the amount within the stipulated time, and proceedings were taken by A against him; but he had not realised the amount of the decree. In a suit by C against A to make him chargeable for the six anna share in the decree, the *Sudder Court* held that A was chargeable to C for such share, with interest.

Upon appeal, such decree was reversed; the Judicial Committee holding, that A must be treated as a trustee for C, and that in the absence of fraud upon the *cestui qui trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to C for such amount of the debt as had been recovered, or without his wilful default might have been recovered.

§ 46. Assets in India may be invested in Company's paper. So Mr. *Lewin* writes:—Where a testator dies in India, and neither the fund nor the parties entitled to it are under the jurisdiction of the Court of Chancery, it is not the duty of the executor to transmit the assets to England to be invested in the Three per cent. Consols, but he may invest the

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(m) 4 Moore's Indian Appeals, p. 452.

property in the securities of the East India Company, and the tenant for life will be entitled to the dividends or interest, though to the amount of 10 or 12 per cent.

By Lord St. *Leonards'* Act for the Relief of Trustees, 22 and 23 Vic. c. 35, s. 32, trustees in England may invest in India stock: a provision the meaning of which has been the subject of some controversy.<sup>(n)</sup>

§ 47. Perhaps, with reference to the customs of this country, a native trustee would be justified in lending the trust fund upon mortgage of jewels, provided the security was of ample amount to cover the risk, and care was taken that the money with interest was repaid, or the jewels sold, before they had lain out of his possession so long that their value would not cover the original debt and accumulated interest. But as a general rule a trustee will act most prudently in following precisely the terms of his directions, or in acting under the directions of a Court. A trustee may be guilty of a breach of trust by departing from his directions, as by mortgaging when he is directed to sell. So in *Devaynes v. Robinson*<sup>(o)</sup> under an express trust for sale and conversion, trustees were held liable for losses which had arisen from mortgage of the estate.

§ 48. When a trustee sells the trust estate, it is of importance to those with whom he deals, to ascertain whether his receipt is a sufficient discharge for the purchase money. This point resolves itself into two questions, 1st. Is the trustee justified in making the sale. 2nd. Supposing the sale justifiable, is the purchaser bound to see to the application of the purchase-money. All the cases are reviewed by Lord St. *Leonards* in the case of *Stroughill v. Anstey*<sup>(p)</sup> which may be regarded as the leading case. There Lord St. *Leonards* said:

“The consistent rule would be that if a trust be created for payment of debts and legacies, the purchaser or mortgagee should in no case (in the absence of fraud), be bound to see to the application of

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(n) *In re Colne Valley Bill*. 29. J. P. Ch. 33. *The Equitable Insurance Company v. Fuller*: 7 Jur. n. s. p. 367. *Bishop v. Bishop*, 9 W. R. p. 549.

(o) 3. Jur. n. s. 707.

(p) 16 Jur. 671.

the money raised. To this rule, I shall adhere as long as I sit in this Court."

§ 49. The *cestui qui trust* is always entitled to file a suit against his trustee to compel him to do any specific act of duty, and also to prevent his committing a meditated breach of duty.

§ 50. He may also generally follow the estate into the hands of a stranger, where by a breach of trust it has been alienated. So writes Mr. *Lewin*(*g*) in his admirable work on Trusts :—

"If the alienee be a purchase of the estate at its full value, then, if he take with notice of the trust, he is bound to the same extent and in the same manner as the person of whom he purchased, even though the conveyance was made to him by fine with non-claim; for, knowing another's right to the property, he throws away his money voluntarily, and of his own free will; and the rule applies not only to the case of a trust, properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate, or a lien for purchase money. But, if the *bonâ fide* purchaser have not notice, he then merits the full protection of the Court, and his title, even in equity, cannot be impeached."

§ 51. We have already partially discussed the topics of Notice and Laches; but it may be here stated, that as between a trustee and his *cestui qui trust*, no time will bar the remedy when there is an *express* trust. But this doctrine, if applied to *constructive* trusts, would unsettle all title, and lead to general insecurity of property.

"It is certainly true," says Sir *W. Grant* in *Beckford v. Wade*,(*r*) "that no time bars a direct trust; but if it is meant to be asserted that a court of equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises. I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the state of the fact, but where the true state of the fact is easily ascer-

(*g*) p. 609.

(*r*) 17 Ves. 97.

tained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after a long acquiescence, comes into a court of equity to seek that relief."

§ 52. The whole doctrine has lately been reconsidered in the cases of *Life Association of Scotland v. Siddall*, *Cooper v. Greene*,<sup>(a)</sup> where *Turner*, L. J. made the following luminous remarks upon length of time, and acquiescence, as affronting the remedy of a *cestui qui trust* against his Trustee, or Trustee *de son tort*.

"Length of time, where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not, as I conceive, distinct propositions; they constitute but one proposition, and that proposition, when applied to a question of this description, is that the *cestui qui trust* assented to the breach of trust. A *cestui qui trust* whose interest is reversionary is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title, does not seem to me to bear upon the question of his assent to a breach of trust. He is not, so far as I can see, less capable of giving such assent when his interest is in reversion, than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case. The respondents relied much upon some observations which fell from the Master of the Rolls in the case of *Brown v. Cross* (*ubi sup.*), seeming to import that if a *cestui qui trust* knows of a breach of trust he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, and will be held barred by acquiescence if he does not promptly do so. But this broad proposition was not necessary to the decision of that case; and with all deference to the Master of the Rolls, if he intended to lay down the proposition thus broadly, which I doubt, I am not, as at present advised, prepared to assent to it. It is the duty of the trustee to observe the trust, and to preserve the property for the benefit of those entitled in remainder; and I am not prepared to hold that he can be permitted to escape from the liability incident to that duty simply by informing the *cestui qui trust* that he has committed, or intends to commit, a breach, and he cannot, as I apprehend, where the trust is clear, throw

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(a) 9 W. R. p. 541.

upon the *cestui qui trust* the obligation of telling him what his duty is, and of cautioning him to observe it,—thus involving the *cestui qui trust* in the burthen and expense of those duties which he has undertaken himself to perform. If, indeed, there is a discretion to be exercised under the trust, the trustee may apply to the *cestui qui trust* for his advice and assistance in the exercise of it; and if the *cestui qui trust* refuses his aid, he may not be entitled afterwards to complain of what the trustee has done in the exercise of his own discretion. So again, where it is doubtful what ought to be done under a trust, the trustee may give notice to the *cestui qui trust* of his intention to do a particular act unless the *cestui qui trust* interferes to prevent it, and if the *cestui qui trust* does not interfere, the Court might well hold that the trustee was not liable for doing the act. But these are cases in which the trust is not definite or precise, and I am not prepared to say that where the trust is definite and clear a breach of trust can be held to have been sanctioned or concurred in by the mere knowledge and non-interference on the part of the *cestui qui trust*, before his interest has come into possession. The case of *March v. Russell*, 3 My. & Cr. 81, seems to me to be a strong authority against such a proposition. I need hardly add that in cases in which the *cestui qui trust* has encouraged the trustee to commit the breach of trust, he must of course be bound by it, nor need I add that the observations which I have made are meant to apply to cases of express trust, and not to affect the question how far, if at all, they may apply to constructive trusts. Another question which arises in cases of this description is what amounts to acquiescence. Acquiescence, as I conceive, imports knowledge, for I do not see how a man can be said to have acquiesced in what he did not know, and in cases of this sort I think acquiescence imports full knowledge, for I take the rule to be quite settled that a *cestui qui trust* cannot be bound by acquiescence unless he has been fully informed of his right, and of all the material facts and circumstances of the case."

§ 53. No time will bar, or, as it is termed, sanctify a fraud, so long as the fraud remains concealed. The limitation will begin to run from the discovery of the fraud.

§ 54. As a general rule, where the *cestui qui trust* recovers back the property under such circumstances as those mentioned above, he will be entitled to recover also the mesne rents and profits; and it matters not that the character of the property has been altered, as where land has been converted into money.

or money into land. As long as it can be traced, Equity will follow it. In *Taylor v. Plumer*,<sup>(1)</sup> Lord *Ellenborough* said :—

“The product of or substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way, i. e., as predicated only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, or so far ear-marked as to fall within the rule which applies to every other description of personal property, whilst it remains in the hands of the factor or his general legal representatives.”

§ 55. Several very beneficial Acts has been passed in England with reference to the management of trust estates. But as they are not extended to this country, it is unnecessary to do more than mention them here. Such are 13 and 14 Vic. c. 60; 15 and 16 Vic. c. 55; 22 and 23 Vic. c. 35; and 23 and 24 Vic. c. 145. There is a useful Act for the appointment of official trustees by the Indian Supreme Courts Act XVII of 1840, but as this does not extend to the Company's Courts, it is not necessary to consider its details.

§ 56. Of course Equity will not sanction any trust created for defeating the Law, or against the policy of the Law.\* Such

(1) 3 M. and S. 675.

\* Contracts against the policy of the Law have been already considered. See Ante p. 265. And as to a man settling property in trust, on his marriage, on himself till bankruptcy, insolvency, alienation, and then upon trust to pay his wife, see *Lockyer v. Savage*, 2 Str. 947: on which *Wood*, V. C. in *Knight v. Brown*, 9 W. R. 516, made the following remarks: “it was settled by a series of authorities beginning with *Lockyer v. Savage*, 2 Strange 947, that in the case of bankruptcy where a person limited his own property to himself for life with a provision that it was to go over in case of his bankruptcy, such a limitation was void as against his assignees,” upon the principle as expressed by Lord *Elton*, who regretted, however, that he was unable to assist the wife (see *Higinbotham v. Holme*, 19 Ves. 88), that the policy of the law was not to be defeated by the prospective act of the individual. In Ireland the doctrine had been extended to insolvency, but he did not find a single case which



in England are trusts in Mortmain : trusts for creating perpetuities, and the like ; and when a trust is created with such an object, the Court, writes Mr. *Lewin*, will neither enforce the trust in favour of the parties intended to be benefited, nor will assist the settler to recover the estate.

Thus in *Cottingham v. Fletcher*<sup>(u)</sup> before Lord *Hardwicke*, a papist had assigned an advowson to A B, for a term of ninety-nine years, for the purpose of evading the statutes which vested in the two universities presentations of livings in the gift of papists. The grantor afterwards conformed to the Protestant religion, and filed a bill against A B, playing a discovery of the secret trust. The defendant pleaded the Statute of Frauds, by which all declarations of trust are required to be in writing, but admitted by his answer for what purposes the assignment had been made. Lord *Hardwicke* held, that, if the plea had stood by itself, it might have been good enough, but, coupled with the answer, which was a full admission of the facts, it ought to be overruled ; but his Lordship added, "If the defendant had *demurred* to the bill, it might have been of a different consideration ; for, as the assignment was done in fraud of the law, he doubted at the hearing, whether the plaintiff could be relieved, such fraudulent conveyances being made absolute against the grantor." The opinions of Lord *Eldon* are expressed in the following remark upon this case :—"Lord *Hardwicke*," he observed, "is made to say, that, upon the admission of the trust by the defendant, he would act. I do not know whether he *did* act upon it, but it is questionable whether he *should*, for there is a great difference

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had gone beyond that. In a note to *Wilson v. Greenwood*, 1 Swan. p. 481, the law was thus stated :—"The general distinction seems to be that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy ; but cannot, by contract or otherwise, qualify his own interest by a like condition determining or controlling it, in the event of his own bankruptcy, to the disappointment or delay of his creditors ; the *res disponendi*, which for the first purpose is absolute, being in the latter instance subject to the disposition previously prescribed by law."

The policy of the law cannot be circumvented by a trick ; on which principle it was decided in *Brooke v. Brooke*, 7 Jur. n. s. 422 that the English law forbidding marriage with a deceased wife's sister could not be evaded by the parties going to Denmark and getting married there, where such marriages are legal.

(u) 2 Atk. 156.

between the case of an *heir* coming to be relieved against the act of his ancestor in fraud of the law, and of a man coming upon *his own act* under such circumstances. It is said it might be different, if it had come on upon demurrer. Lord *Hardwicke* means to say, that, if the defendant admits the trust, though against the policy of the law, he would relieve; but if he does not admit the trust, then, the plaintiff stating he had been guilty of a fraud upon the law to evade the provision of the legislature to which he was bound to submit, and coming to equity to be relieved against his own act, and the defence also being dishonest, the Court, between the two species of dishonesty, would not act, but would say, Let the estate lie where it falls."<sup>(v)</sup>

The distinction here taken by Lord *Eldon* between a bill filed by the author of the fraud himself, and by a person taking through him, but not a party to the fraud, is supported by other authority,<sup>(w)</sup> and may be illustrated by the two following cases, both arising out of the same transaction, the one before Lord *Redesdale*, and the other before Lord *Man-ners* :—

*John Brown*, a trader in partnership with his brothers *William* and *Thomas*, resolved on commencing business as a banker; and, for the purpose of avoiding the penalties of the statute against a banker's trading, he assigned all his interest in the mercantile concern to his brother *William* in trust for himself; and *William* executed a declaration of trust accordingly. Shortly afterwards, *William* also, intending to enter into a banking-house, prevailed on *Thomas* to become trustee both for himself and *John*, for their respective shares in the partnership. *William Brown* died, and *Thomas Brown*, the trustee, became bankrupt. The legatees of *William* filed a bill against the assignees and others to have the benefit of the secret trust, and Lord *Redesdale* said, "I will not enter into

(v) *Mukleston v. Brown*, 6 Ves. 68; and see *Chaplin v. Chaplin*, 3 P. W. 233; *Hamilton v. Ball*, 2 Ir. Eq. Rep. 191; *Groves v. Groves*, 3 Y. & Jer. 163.

(w) *Matthew v. Hanbury*, 2 Vern. 187; *Brackenbury v. Brackenbury*, 2 J. & W. 391; *Miles v. Durnford*, 2 Mac. & Gord. 643; and see *Phillpotts v. Phillpotts*, 10 Com. B. Rep. 85; *Groves v. Groves*, 3 Y. & Jer. 163. See a classification of the cases in reference to cohabitation bonds, 3 Mac. & Gor. note (c), page 100.

the question, whether *William* might not have compelled *Thomas* to account with him as trustee, if he had brought a bill in his lifetime; but, as between the creditors and legatees of *William* (on the one side) and *Thomas* (on the other), there is no doubt, in point of conscience, *Thomas* was bound to consider this a trust for them; and accordingly he does, after the death of *William*, acknowledge himself to be a trustee. I remember a case, where a person, who was executor to a smuggler, on being called on to account for the estate of the testator, endeavoured to avoid a considerable part of the amount, by saying that they were smuggling transactions, on which the Courts could not allow any action to be maintained. The answer was, All that died with the smuggler; he could not have himself sued, but his executor shall not set up that as a defence against his creditors and legatees."<sup>(x)</sup>

Afterwards, *John Brown* himself filed a bill in Chancery to have the benefit of the trust; but Lord *Manners* said, "The bill in this case is brought by *John Brown* himself, and I am quite clear that he cannot recover; and, as he has endeavoured to make this Court ancillary to his plan for evading the provisions of a positive law, I must dismiss the bill with costs."<sup>(y)</sup>

§ 57. Where, however, the trust, though unlawful, and therefore inoperative, is not tainted with fraud, the Court may grant relief even to the settlor. Thus, A settled personal property upon B and C, and such other illegitimate children of D as should be thereafter born, if they respectively attained the age of 25. B and C died under 25, but other children were born, and then A filed a bill for the retransfer of the fund, and there being no fraud on the part of the settler it was so directed.<sup>(z)</sup>

§ 58. Breach of Trust is punishable criminally under Act XIII of 1850,<sup>(a)</sup> but it has been held that the party injured may maintain a civil suit without prosecuting under that Act. See App. 97 of 1859. *Mad. S. R.* of 1859, p. 258, and see Ante p. 122, Note (d).

(x) *Joy v. Campbell*, 1 Sch. & Lef. 323, see 335, 339.

(y) *Ottley v. Brown*, 1 B. & B. 360.

(z) *Wilkinson v. Wilkinson*, 1 Y. & C. Ch. 657.

(a) And now in England by 20, 21, Vic. C. 54. See also 5 Jur. n. s. pt. 2, p. 481.

## TOPIC THE TWENTY-FIRST.

### GUARANTIE.

*"Pro eo qui promittit, solent alii obligari, qui fidejussores appellantur; quos homines accipere solent dum curant ut diligentius sibi cautum sit."*

INSTITUTES. L. III. T. XX.

§ 1. A guarantie is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself in the first instance liable to such payment or performance. The debtor is primarily liable, the surety secondarily; his promise to pay is only in event of the debtor not paying or performing his contract.\* But the liability of the Surety arises immediately upon the breach of promise or contract by the Principal; and it is not necessary then for the Creditor to resort in the first instance to his remedy at law against the principal creditor; he may forthwith sue the Surety: who has his subsequent remedy over against his own principal. It seems to have been considered otherwise in a Madras Case, (a) in which it was held that the creditor, having another security from the principal debtor, was compelled to exhaust that before his right against the Surety arose. But certainly, according to the Law of England, the Surety is liable to be sued in the first instance; and the form of pleading throws, as often occurs, much light on the state of the Law. In suing a Surety, it is not even necessary to aver that the principal creditor has not paid.†

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\* Some confusion is likely to arise, unless we recollect that in guarantee transactions the parties are spoken of by different names with reference to their relation to each other. Thus the original transaction is between two parties who stand to each other as *Creditor* and *Debtor*. When the Surety appears upon the stage, he is also a *debtor* to the original *Creditor*, but he is, or may be, a *Creditor* to the party for whom he gives the guarantee. As between these two again, the one is *Principal*, the other *Surety*. But the transaction requires three parties, who may be designated or remembered as *Creditor*, *Principal*, and *Surety*.

(a) 83 of 1856, S. Rep. for 1857, p. 125.

† So in an old case in *Rolle's Abridgment*, Vol. 2, p. 733, it is laid down in the quaint legal phraseology of the day—"Se A. soit oblige all B. en un

§ 2. This is a contract in which *uberrima fides* is looked for. It was thought at one time indeed that there was something peculiar in the contract of *Guarantie*, which compelled the same amount of disclosure as is required in Insurance cases, where *any* omission to disclose vitiates the contract, if it be of a circumstance which might influence the judgment of the insurer. See *Ante* p. 236. This was expressly held by Lord *Truro* in *Owen v. Homan*,<sup>(b)</sup> but this doctrine was not acquiesced in by the House of Lords, where the case was carried.<sup>(c)</sup> In the case of *Hamilton v. Watson*,<sup>(d)</sup> Lord *Campbell* said,

“ The question is, what, upon entering into such a contract, ought to be disclosed? And I will venture to say, if your Lordships were to adopt the principle laid down and contended for by the appellants counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that every thing should be disclosed by the creditor that is *material* for the surety to know.”

The *North British Assurance Co. v. Lloyd*,<sup>(e)</sup> also establishes the principle that in the absence of fraud, the omission to disclose will not vitiate the contract. There Sir *Thomas Brancker* obtained from the plaintiffs (an Assurance Company) a loan of £10,000 for a certain period, on the deposit of shares, he agreeing to give further security, or pay off a portion of the loan, in the event of the value of the shares becoming depreciated below a certain sum. At the period for repayment such depreciation had taken place, but the loan was renewed for a further period on the same terms, on the deposit of additional shares, at

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*obligation de 40l, pur payment de 20l, per le condition al un jour, & A. ne ceo pay mes foie eloign, issint que B. ne poit aver son debt; fur que C. un etranger en consideration que B. voilt doner a luy un certain quantity de herrings, & voilt ausi faier a luy un letter d'attorney a fuer le dit obligation, assume & promise al B. a garranter le dit 20l. al B. En cest case en un action fur cest promise ess bon assignement d'un breach que il ad ferforme le consideration, & que C. nad paie a luy le 20l. sans dire que A. ne luy paie ou que il ne suit able a ceo paier, car le garrantie esseant persmall, & l'entent per assignement del obligation appiert que il doit paier le debt sans aucun reference al A. Mich. 7 Car. B. R. enter Michaell et Carden adjudge, ceo esseant move en arrest de judgment.”*

(b) 15 Jur. 339.

(d) 12 Cl. and Fin. 109.

(c) 17 Jur. : 861.

(e) 1 Jur. n. s. p. 45.

the acceptance of *James Brancker*, the brother of the principal for £2000. Before the expiration of the renewed period, *James Brancker*, the brother applied to the plaintiffs to be released on obtaining the guarantee of the defendant and three other persons for £500 each. The plaintiffs assented, and a guarantee was drawn up by their solicitor, not referring to the acceptance, but reciting the consideration for the guarantee to the original loan, and the plaintiffs agreeing not to require any further security in the event of the depreciation of the shares, as provided for by the original agreement. The defendant had no notice of the transaction between the plaintiffs and *James Brancker*. In an action upon the guarantee, the defendant contended that he was not liable, because he had not been informed that his security was required as a substitution for the security of *James Brancker*, a circumstance which might have induced him to make inquiries; and, indeed, the defendant swore at the trial that if he had known this fact he would not have become responsible. It was further urged that the recital of the guarantee was incorrect, and did not disclose the real state of the facts and the true object of the principal and that in effect a legal fraud had been practised upon the defendant. The Jury found that the substitution of the security was not a circumstance material to be disclosed; and the Court held, that even, if it had been material the mere non-disclosure of it would not affect the defendant's liability; that nothing short of actual fraud would be sufficient for that purpose; and that the concealment, to be available by the surety, must have been made with a fraudulent intent. In the course of the argument *Parke, B.* said,

"I deny that there is any such rule established as that the creditor is bound to disclose every fact that might affect the surety. Nothing short of actual fraud will do. If it were otherwise no person could safely take a guarantee. According to the position contended for, the sureties could never be changed without letting the fresh sureties know. A very able treatise by an American Jurist shows that it is by usage of trade that every thing in cases of assurance must be disclosed, and that it does not rest on the ground of fraud."

And in delivering judgment *Pollock, C B.* said,

"It is not a correct proposition that the same rule prevails in case

of guarantees as in assurance on either ships or lives, in which it is a settled rule, no doubt, that all the material circumstances known to the assured are to be disclosed, though there should be no fraud in the concealment. It is a peculiar doctrine applicable to contract of assurance, in which in general the assured knows, and the underwriter does not know, the circumstances of the voyage, and of other matters. All the cases have been decided over and over again to be on the same footing as actual fraud, and not constructive fraud. But that the mere relationship of creditor and surety requires in all cases a full disclosure of all material circumstances was distinctly denied by the House of Lords in the case of *Hamilton v. Watson* (12 cl. & Fin. 109). The non-disclosure of the circumstance of the change of security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back."

So in *Wythes v. Labouchere*(f) it was held that a concealment on the part of a creditor must be of some material part of the transaction itself between the creditor and his debtor, to which the suretyship relates, and there is no legal obligation on the part of the creditor to disclose to the intended surety matters affecting the general credit of the debtor, or any other circumstances unconnected with the particular transaction.

And in *Pledge v. Buss*(g) it is settled that

"There must be something amounting to fraud to enable a surety to say that he is released from his contract on account of misrepresentations or concealment."

The result of the cases therefore is, that the contract of Guarantee or Suretyship does not differ from the ordinary rule of contracts (other than Insurances) by which the necessity of representations and disclosures, and their quality, are judged of. Of course any wilful misrepresentation of a material fact voids the contract; as to which see the observations on misrepresentation and fraud generally. *Ante* p. 208, 234, 242-249.

§ 3. Much learning upon the form of guarantee it is superfluous to notice here. The Statute of Frauds and the 9th Geo: 4, c. 14, known as *Lord Tenterden's Act*, require the contract to be in writing, and to show the consideration as well as the pro-

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(f) 5 J. n. s. p. 499.

(g) 6 Jur. n. s. 695.

mise. The leading cases are given below. Those Statutes do not extend to other than British subjects. By the Mercantile Law Amendment Act, 19 20 Vic. c. 97, s. 5, it is now no longer necessary that the consideration should appear upon the face of the instrument, much injustice having been the consequence of the earlier enactments. According to the Hindu Law, all contracts may be by word of mouth; of course, the degree of credit which the Court will pay to an alleged guarantee will differ much, where it is asserted to have been merely parol, and where it is testified by some writing by the party to be charged; but that consideration falls under the province of the Law of Evidence. Occasionally the Judge in the interior, and especially on the coast, where seaports and English merchants are to be found, may have guarantees to decide upon, where both parties are British subjects, or where the Defendant is such: (and the law of the Defendant always governs each case.) There, the Court will have to consider the effect of the Statutes above alluded to; for every British subject takes the Statute of Frauds about with him, and Lord *Tenterden's* Act has been expressly extended to cases governed in this Country by English Law, by Act XIV of 1840. But as I do not profess to write for exceptional cases, and every judge ought to have the ordinary text books at hand, it will be sufficient to refer him to the leading cases of *Birkmyr v. Darnell*. 1 Sm: L. C. p. 224 and *Wain v. Walters*, 2 Sm: L. C. p. 191. *Smith's Mercantile Law*, p. 438—448. *Smith on Contracts*, p. 42. *Chitty on Contracts*, p. 445. It must suffice here to point out that the party guaranteed, i. e. the party in support of whose credit the guarantie is given, will continue liable to his creditor, though his surety be discharged. The Statute applies only to collateral engagements, and where the original debt is *extinguished* by a new undertaking, the undertaker becomes principal, not surety. Only where the original debt is not *extinguished* does the relation of Surety arise.

§ 4. Among the ordinary transactions which give rise to guaranties may be mentioned an undertaking to pay the debt of another when money has been lent, or goods sold; or to see the creditor paid where money is about to be lent, or goods about to be sold: guarantees for the completion of unfinished work, guarantee of debt in consideration of a forbearance to sue,



or to distrain; the abandonment of lien, or release from arrest; guarantees for faithful discharge of duties by public officers, clerks, and the like. But it is evident that the occasions on which guarantees arise must be very various.

§ 5. Questions frequently arise upon the *extent* of the Surety's liability. This must be decided by the construction of the particular contract and circumstances in each case. But the dispute generally arises as to whether a guarantee embraces more than one particular transaction, or as it is called, whether it is a *continuing* guarantee. A guarantee "of any debt that A may contract in his business as jeweller, not exceeding £100 after this date," renders the Surety liable to the extent of £100 contracted from time to time. It is a sort of floating liability to cover the balance at all times up to that amount; not merely a promise which ceased to be effectual from and after the moment when A first contracted a debt of £100, and reduced or liquidated it. The plain rule for deciding such questions has been stated by Lord Ellenborough in *Merle v. Wills*.<sup>(h)</sup>

"If a party means to confine his liability to a single dealing he should take care to say so."<sup>(i)</sup>

§ 6. The methods by which a surety may be discharged are so compendiously stated by *Smith* in his *Mercantile Law*,<sup>(j)</sup> that I cannot do better than give the passage in full; giving the latest cases by way of note.

"If the creditor discharge the principal, or enter into any agreement with him, by which the surety's situation is altered for the worse<sup>(k)</sup> or which would render a proceeding against the surety a fraud upon the principal, he discharges the surety; for instance, if he agree to give time to the principal<sup>(l)</sup> for then, if he forbear proceeding during the time

(h) 2 Cam. 413.

(i) The Surety need not say this in *express* word, but the instrument must admit of no other construction. *Re Medeva Trust* 26. Bear. 588.

(j) p. 450.

(k) Semble that if a creditor release by deed one of his sureties who are jointly and severally liable, the other is also discharged. *Evans v. Bremridge*, 2 Jur. n. s. 134.

The dicta to the contrary in *Ex parte Giffard* 6, Ves. 805 have not been followed.

(l) This does not apply when the agreement to give time is made with a stranger. *Fraser v. Jordan*, 3 Jur. n. s. 1054. Moreover, it is not every alteration of his position by the act of his creditor which discharges the surety. To have this effect, the alteration must be such as interferes for a time with his

given, he wrongs the surety by prolonging his responsibility; while, on the other hand, if he proceed against the surety, he gives him a remedy over against the principal, and thus exposes the latter to proceedings, contrary to the faith of his agreement. So, if he substitute a new agreement instead of that for the performance of which the surety was responsible. But the surety will not be discharged by mere forbearance,<sup>(m)</sup> unless, indeed, there be some stipulation in the guarantee binding the party guaranteed to use due diligence against the principal, nor by acceptance of a collateral security, nor if he himself have agreed to the indulgence given the principal, or have subsequently assented to it. And, even where the creditor has altogether released and discharged the principal, still, if the surety have expressly consented to remain liable, his liability will continue.<sup>(n)</sup> If the creditor omit to perform any condition, express or implied, imposed upon him by the guarantee, the surety will, of course, not be liable.<sup>(o)</sup> And fraud, for instance, the concealment of some material part of the principal's original contract from the surety—vitiates and avoids his engagement. The principle to be drawn from the cases,

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remedy against the principal debtor. *Tucker v. Lainj*, 2 Kay & J. 745. Thus, releasing or compounding with the debtor, renewing bills, withdrawing execution without the surety's knowledge, will operate as a discharge of the surety; or if the creditor loses or lets securities get into the hands of the debtor, the surety will be discharged to the extent of such security. Taking a further security from the debtor, after the contract of suretyship, will not discharge. *Gordon v. Calvert*, 4 Russ. 581: unless the second be in satisfaction of the first security. *Clarke v. Henty*, 3 Y. & C. Ex. C. 187.

(m) See *Strong v. Foster*, 17 C. B. 201. S. C. 25 L. J. C. p. 106 and in *The Mutual Loan Fund Association v. Ludlow*, 5 Jur. n. s. p. 388. when money is borrowed on the security of a bill of sale of the borrower's goods, together with a promissory note for the amount of the loan, signed by him and a third person, payable by instalments, the whole of the residue unpaid to become due upon default in payment of any instalment; and, default being made, the lender takes and sells the goods, and then sues the third person for the balance; it is a good and equitable defence for him to set up, that he signed the promissory note as surety merely, to the knowledge of the plaintiff, and that the goods would have sufficed, if properly sold, to satisfy the whole claim of the plaintiff, yet by his negligence and misconduct of the sale a loss was occasioned.

(n) In giving time to the debtor, the creditor may reserve his rights against the surety, and it seems that notice of such reservation need not be imparted to the surety. *Wyke v. Rogers*, 1 De. G. M. & G. 408.

(o) So a surety who has contracted to become so on the understanding that he is to be co-surety with another, is wholly released in Equity, if the intended co-surety does not execute. *Evans v. Bremridge*, 2 Jur. n. s. 311. So in the *General Steam Navigation Company v. Rolt*, 6 Jur. n. s. 801: Where a surety contracts with A on behalf of a principal, the withdrawal, by arrangement between A and the principal,

"said *Tindal*, C. J., delivering the judgment of the Court in *Stone v. Compton*, we take to be this, that, if with the knowledge or assent of the creditor any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the *misrepresentation* being such, that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is voidable at law on the ground of fraud." (p)

§ 7. But where the creditor releases the principal, on a representation of the surety, which turns out to be founded in mistake, though not to the surety's knowledge, the surety cannot claim the benefit of the doctrine that the release of the principal releases the surety. *Scholfield v. Templer*.<sup>(a)</sup> It would be otherwise where the creditor releases the debtor through some mistake of his own. There the surety is discharged.

§ 8. So careful is the Law to protect a surety from any further liability than what he voluntarily incurred and intended to incur, that even when the situation and responsibility of his principal have been altered or extended, not by the act of the creditor, but of the Law itself, as where an Act of Parliament has, after the contract of suretyship, operated upon the status of the debtor, the surety has been held to be discharged. So in *Pybus v. Gibb and others*.<sup>(r)</sup> the condition of a bond recited that a bailiff of a country court had been appointed under the 9 & 10 Vict. c. 95, and stipulated for the proper execution by him of all warrants issued out of the said court to the high bailiff, and for his due performance of the office of bailiff, and for his not taking any fees except those

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of funds which the surety had a right to rely on as a security that the things should be done which he, as surety, had contracted with A should be done, is a prejudicial alteration of the surety's position, which discharges him from liability. In *Watts v. Shuttleworth*, 5 H. & N. 235, it was held in equity that upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged.

(p) The leading case is that of *Rees v. Barrington*, 2 Tud. and W. L. C. 814, which with its Note should be carefully studied.

(q) 5 Jur. n. s. 619.

(r) 3 Jur. n. s. p. 315.

specified in that act. Statutes were afterwards passed increasing the jurisdiction of the county court in point of amount, giving it jurisdiction in matters of insolvency and over absconding debtors, and enabling any one of the bailiffs authorised by the judge to sell goods seized in execution without the intervention of a sworn broker. The Court of Queen's Bench held, that by these statutes the duties and liabilities of the office were essentially changed, and the risk of the sureties increased, and that consequently they were discharged, although the breach of duty relied on arose entirely out of the original duties of the office.<sup>(a)</sup>

§ 9. A surety has two methods of protecting or recouping himself for any payment he may have been compelled to make. He has a right of *reimbursement* against the principal debtor; and he has a right of *contribution* against his co-surety, when there may be more than one, for whatever he has been forced to pay over and above the amount of his own proportional share of the joint liability.

§ 10. In England, contribution has usually formed the subject of a suit in Equity, except in very simple cases. There is however a concurrent jurisdiction in the Courts of law. The right to contribution was held by Lord *Eyre*, in *Dering v. Earl of Winchelsea*<sup>(a)</sup> (the leading case) to be founded not on contract, but in a general equity. Courts of Common Law in modern times, it is true, have assumed a jurisdiction founded on an *implied* promise, and 19, 20 Vic. c. 97, s. 5, may give them a more extended jurisdiction still. But constituted as such Courts are, the remedy must ordinarily be more efficacious in Equity. This is of comparatively little importance in this country, where our Courts are all Courts of Equity: beyond this, that we shall look for our clearest guides in the decisions of the English Equity Courts.

§ 11. Contribution rests upon the principle stated in the language of *Francis' Maxims*, "that he should have the

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(a) And see *Oswald v. the Mayor of Berwick upon Tweed*, 2 Jur. n. s. p. 743, the *Mayor, &c., of Dartmouth Harbour v. Silly*, 26 L. J. Q. B. 90.

(c) 1 Cox. 318. S. C. 1. T & W. L. C. 78.

satisfaction which sustained the loss." Illustrations of its application are to be found in various departments of the Law. Thus in *Sterling v. Forrester*,<sup>(u)</sup> Lord Redesdale said,

"The decision in *Deering v. Lord Winchelsea* proceeded on a principle of law, which must exist in all countries, that, where several persons are debtors all shall be equal. The doctrine is illustrated in that case by the practice in questions of Average, &c., where there is no express contract, but Equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally. So it is where goods are thrown overboard for the safety of the ship. The owners of the goods saved by that act must contribute proportionally of the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation."

Familiar instances will occur to the reader, of contribution by Legatees, where the assets of the testator fall short, and the like. In fact, wherever one has received an advantage, it is equitable that he should share the burthen also. If any other rule were allowed, the creditor might select which of the sureties he pleased as his victim.

§ 12. In some cases the law will by implication hold that men without any contract are bound to contribute to defray one another's loss. This occurs in *jettison*, where a *general average* is struck, and the cost of the goods thrown overboard for the general weal must be shared among all who have merchandize in the ship. So the *Rhodian Law* provided: "*Lege Rhodid*," says the *Digest*, (14 2 l. 1,) *cavetur utsi levandæ navis gratiâ jactus mercium factus est omnium contributione sarciantur quod pro omnibus datum est*: nor is the principle confined to cases of actual *jettison*; it applies to losses incurred, or money paid, in the course of maritime adventure, for the common benefit of all.

§ 13. It may not be out of place to remark here, that there can be no compulsory contribution between wrong doers. Thus in a suit for damages against several trespassers, as

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(u) 5 Bligh's Rep. 496.

where they have beaten the plaintiff, or injured his property, the judgment awards a gross sum. Each is liable for the whole, and the execution may proceed against the goods of one or more. Such a one could not sustain an action against his fellow *tort-feasor* for contribution of what he had paid over and above his own supposed share. But where one of co-trustees has been guilty of a breach of trust, short of fraud, the rule is to sue all. The *cestui qui trust* may take out execution against any one of them he chooses : for each trustee is individually responsible for the whole. But a suit will lie by one Trustee against his co-trustees to compel contribution ; and so where a third party has reaped the benefit of the breach of trust ; though the trustees must in the first instance reimburse the injured party, the loss may ultimately be cast on the party who was gainer by the breach of trust. Where the Trustees conduct has been fraudulent, Equity stands aloof, and will not compel contribution by his co-trustees.

§ 14. The principles on which Sureties are indemnified are thus laid down by *Story*.<sup>(v)</sup>

" Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal ; but they are also entitled to the benefit of all securities, which have been taken by any one of them to indemnify himself against such liabilities. Courts of Equity have gone farther in their favour ; and held them entitled, upon payment of the debt due by their principal to the Creditor, to have the full benefit of all the collateral securities, both of a legal and an equitable nature, which the creditor has taken as an additional pledge for his debt. Thus for example, if at the time when the bond of the principal and surety is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt ; there, if the surety pays the debt, he will be entitled to have an assignment of that mortgage, and to stand in the place of the mortgage.<sup>(w)</sup> And, as the mortgagor cannot get back his estate again with-

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(v) Eq : Jur : § 499.

(w) So in *Pearl v. Deacon*, 3 Jur. n. s. 579 affirmed p. 1187, where P joined as surety in a note to secure one half of a debt with a knowledge that the debt was also secured by a Bill of sale of the debtor's furniture. The creditor, who was the debtor's landlord, took his furniture in execution for rent which subsequently accrued due. It was held that P was entitled to be discharged to the extent of one half the value of

out a reconveyance, that assignment and security will remain a valid and effectual security in favour of the surety, notwithstanding the bond is paid. This, indeed, is but an illustration of a much broader doctrine established by Courts of Equity; which is, that a creditor shall not, by his own election of the fund, out of which he will receive payment, prejudice the rights which other persons are entitled to; but they shall either be substituted to his rights, or they may compel him to seek satisfaction out of the fund, to which they cannot resort. It is often exemplified in cases, where a party, having two funds to resort to for payment of his debt, elects to proceed against one, and thereby disappoints another party, who can resort to that fund only. In such a case, the disappointed party is substituted in the place of the electing creditor; or the latter is compelled to resort in the first instance to that fund which will not interfere with the rights of the other."

§ 15. So in *Copis v. Middleton*,<sup>(x)</sup> Lord Eldon said,

"It is a general rule, that, in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; but then the nature of those securities must be considered. Where there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished. The general rule, therefore, must be qualified by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. In the case, for instance, where, in addition to the bond, there is mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond; but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate which has not got back to the debtor.'"

§ 16. But where there is no collateral security from the debtor, but only his original liability, which is paid off by the

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the distress. And so in *Pledge v. Buss*, 6 Jur. n. s. 695, a person having a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt which he has guaranteed, to take the security in its original condition, unimpaired. Therefore, where the principal creditor and mortgagee, on the bankruptcy of the debtor, took a conveyance of the equity of redemption of the mortgaged premises, and in consideration thereof released the debtor and his estate from all claim, it was held, that the surety was thereby released from his liability.

(x) 1 J. and R. 229.

surety, a question has arisen, whether the surety is entitled to have the original undertaking of the debtor assigned to him by the creditor ; for it has been argued, the undertaking is *extinguished* by the payment, and there is nothing to assign. In *Hodgson v. Shaw*,<sup>(y)</sup> Lord Brougham said,

“The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or quasi contract ; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the Court in this respect was luminously expounded in the argument of Sir Samuel Romilly in *Graythorn v. Swinburne* ; and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. A surety, to use the language of Sir S. Romilly’s reply, will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment ; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety ; having a right to have those securities transferred to him, though there was no stipulation for that ; and to avail himself of all those securities against the debtor. I have purposely taken this statement of the right, because it is there placed as high as it ever can be placed, and yet it is quite consistent with the principle of *Copis v. Middleton*.”

“Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty or any remedy on any specialty, after the bond is gone by payment ? The surety may enforce any security against the debtor which the creditor has ; but, by the supposition, there is no security to enforce, for the payment has extinguished it. He has a right to have all the securities transferred to him ; but there are, in the case supposed, none to transfer ; they are absolutely gone. He may avail himself of all those securities against the debtor, but his own act of payment has left none of which he can take advantage.”

“But it is most material to the question now before the Court, to mark and keep distinctly in mind the grounds of the decision in *Copis v. Middleton* ; and it is for this reason that I have deemed it necessary

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(y) 3 M. and K. 190.



to state them so particularly ; for they are such as do not exist at all in the case at present under consideration."

"Suppose that the debt in *Oopis v. Middleton* had been paid, not by the surety bound in the same obligation with the principal, but by a third party, who had by a separate instrument made himself liable for the same debt ; it is clear that the reason upon which the decision rested would have failed altogether, while every one of the general arguments drawn from the rights of a surety to stand in the shoes of the creditor would have risen up against the decision with a force not to be resisted. Now that is the present case. *John Whaley* became bound in the year 1816 with *Henry Shaw* as the surety of *Richard Shaw*, the principal debtor. In the obligation entered into in that year he became bound by an instrument executed separately from the original bond ; and he and his representatives subsequently paid off the debt which he had then incurred, and paid it off in discharge of his own obligation. The debt on the original bond being thus satisfied as far as the creditor was concerned by the second bond being paid off, the original bond of 1812 was assigned in trust for the estate of *John Whaley*, which had thus discharged the debt."

"It cannot in this case be contended that the specialty was gone ; that the bond of 1812 was paid off and at an end, and that in the year 1830 there remained nothing to be assigned. The bond of 1812 subsisted to the effect of being assignable ; the bond of 1816, indeed, was paid by *John Whaley*, and could not be assigned to him or his representatives so as to give him a claim as a specialty creditor against *Henry Shaw's* estate. As against the estate *Whaley* could only claim on the *indébitatus assumpsit* at law, and, in equity, he could only stand as a simple contract creditor ; for there was no longer any thing capable of assignment ; the security was gone by being paid off, but the security of 1812, in which the transaction had its origin, remained ; the payment, which of necessity must be attributed to the bond in which *John Whaley* was an obligor, could not extinguish that to which he was a stranger ; there was something consequently to assign, and an assignment was in fact executed. *Copis v. Middleton* was the case of *John Whaley* or his representatives claiming as specialty creditors against *Henry Shaw* or his estate ; and, according to the rule in that case, they would have claimed in vain. *Copis v. Middleton* was not the case of *John Whaley* or his estate paying his separate bond, and taking an assignment of a formerly executed and still subsisting security, viz, the bond of 1812, and no one of the reasons which decided that is applicable to this case."

" Thus, to try how far these reasons apply, a surety has a right to all the securities in force against the principal debtor. *John Whaley* or his representatives, therefore, have a right to the benefit of the bond given by *Richard Shaw*, because that is still in force. In *Copis v. Middleton* the Court admitted the surety's right, as against the principal debtor, to stand in the shoes of the creditor, but said, there were no shoes for him to stand in, because the bond, having been paid off by a party to it, was gone at law. Here there are such shoes; the bond of 1812, is not paid off, and it has been formally assigned by the creditor to *John Whaley's* representatives.

" It is difficult to suppose a ground for excluding *John Whaley's* representatives in this case that would not deprive any purchaser of a bond of the right to what he had bought, or at least prevent a collateral surety from becoming purchaser of the obligation which he had guaranteed by a separate instrument. By paying off his own bond and obtaining an assignment of the bond of 1821, *John Whaley* and his representatives had become purchasers of the latter specialty, and stood in the relation of assignees of the debt. It is true that, if the surety had paid off the bond in which he was bound, he could have no assignment; but that is because, in paying at once his own debt and the principals, he had extinguished the obligation."

" In deciding *Copis v. Middleton*, Lord *Eldon* expressly admitted that where a mortgage has been given in further security for the same debt, the surety who paid off the specialty was entitled to an assignment of the mortgage; and so if there was but one specialty, viz. the mortgage, because there the payment did not, as in the case of a bond, extinguish the security without a reconveyance, and there was something to assign or transfer. It is impossible, in principle, to distinguish the case so put from the present; the ground of debt is the same in the mortgage and the bond, as it is the same here in the bond of 1812 and the bond of 1816. Paying off the mortgage debt would have effectually excluded the mortgagee from any recourse against the estate in equity; and so would paying the bond of 1816 have prevented, in equity, the obligee from suing on the bond of 1812, and might possibly have called, from the Court of Common law in which any such action was brought, an order to stay proceeding on it. Yet the original security subsisted, as the mortgage subsisted, notwithstanding the discharge of the second security, and the inability of the creditor to avail himself of it in an equitable point of view, so as to have double satisfaction of his debt. It subsisted, as the mortgage did, only to the effect of clothing the surety with that creditor's rights against the principal debtor.

§ 17. The Roman Law went further than our own. It permitted the surety who had paid the whole debt to call upon the creditor for an assignment of the *very* debt. Upon this subject, writes *Story*,<sup>(2)</sup>

“ A far more liberal and comprehensive doctrine pervades the Roman Law. Not only is the surety by that law entitled in such cases to the benefit of all the collateral securities taken by the creditor but he is also entitled to be substituted, as to the very debt itself, to the creditor by way of cession or assignment. And upon such cession or assignment upon payment of the debt by the surety, the debt is, in favour of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal. *Fidejussoribus succurri solet, ut stipulator compellatur ei, qui, solidum solvere paratus est, vendere cæterorum nomina. Cum is, qui et rem et fidejussores habens, ab uno ex fide jussoribus accepta pecunia præstat actiones; poterit quidem dici, nullas jam esse; cum suum perceperit, et perceptione omnes liberati sunt. Sed non ita est; non enim in solum accepit, sed quodammodo nomen debitoris vendidit. Et ideo habet actiones, quia tenetur ad is ipsum, ut præstet actiones.* Here we have the doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends affirmed. The reasoning may seem a little artificial, but it has a deep foundation in natural justice. The same doctrine stands in substance approved in all the countries which derive their jurisprudence from the Civil Law.

“ The Roman Law carried its doctrines yet farther in furtherance of the great principles of Equity. It held the creditor bound not to deprive himself of the power to cede his rights and securities to the surety, who should pay him the debt; and if by any voluntary and unnecessary act of his own, such a cession became impracticable, the surety might, by what was technically called *Exceptio cedendarum actionum*, bar the creditor of so much of his demand, as the surety might have received by a cession or assignment of his liens and rights of action against the principal debtor. *Si creditor a debitore culpa sua causa ceciderit prope est, ut actione mandati nihil a mandatore consequi debeat; cum ipsius vitio acciderit, ne mandatori possit actionibus cedere.* The same doctrine has been in some measure transfused into the English Law in an analogous form; not indeed by requiring an assignment or cession of the debt to be made; but by placing the surety paying debt, under some circumstances in the place of the creditor. And if the creditor should knowingly have done any act to

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(2) Eq: Jur: § 500—2.

deprive the surety of this benefit, the surety, as against him would be entitled to the same equity, as if the act had not been done. On the other hand, if a surety has a counter bond or security from the principal, the creditor will be entitled to the benefit of it; and may in equity reach such security to satisfy his debt."

§ 18. I have been thus lengthy in explaining what the English Law was, and what was the policy of the Roman Law, in order more fully to impress upon the reader the salutary change which has been effected by 19 & 20 Vic. c. 97, s. 5, which enacts that,

"Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, speciality or other security which shall be held by the creditor in respect of such debt or duty, *whether such judgment, speciality, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty*; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or equity, in order to obtain from the principal debtor, or any co-security, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

§ 19. When a surety gets rid of an obligation at a less sum than its full amount, he will not, as against his principal, be allowed to make himself a creditor for a larger amount than he has actually paid in discharge of their common obligation. *Reed v. Norris.*<sup>(a)</sup>

§ 20. This seems a not improper place for mentioning the

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(a) 2 M. and Cr. 361, 375.

doctrine of appropriation of payments. Suppose a surety paying the principal creditor, with whom he had another distinct account, or the case of the principal debtor paying the creditor with whom he had another account than that guaranteed, it may become important to consider whether such payments have been appropriated by any of the parties to the discharge of the specific debt, or whether it is still open to consider such payments as made generally, or whether the creditor has still a right to appropriate them to other account than that guaranteed. The doctrine of the Law with respect to appropriation of payments is contained in a very concise passage in *Smith's Mercantile Law* :<sup>(b)</sup> which will serve as a guide in such questions.

"It frequently happens, that a party who pays money is indebted in several ways to the party who receives it from him; in such cases it becomes a question to the reduction of which of his debts the payment must be applied. The rule is, that the party paying has power to make the application at the time of payment—which he may do either by express words, or a conduct indicative of his intentions; but that, if he neglect to make it, the party receiving may, and is not bound to make an immediate application; and, though it was once said, that, perhaps, he ought to make one within a reasonable time, it seems now pretty well established that he may make it at any time before the matter comes to the consideration of a jury. There are two old cases, in which it is laid down, that if principal and interest are both due, a general payment shall be ascribed first to the interest."

"When there is an account current between the parties, ex. gr. a banking account, the law, in the absence of any other specific arrangement between them, presumes that they intended to apply the first item on the credit side to the first item on the debit side, and so on. "The Civil law," said *Tindal*, C. J. in *Mills v. Fowkes*. "it is said, applies the payment to the more burdensome of the two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the law of England, the debtor may in the first instance appropriate the payment—*solvitur in modum solventis*: if he omits to do so, the creditor may make the application—*recipitur in modum recipientis*; but if neither make any appropriation the law appropriates the payment to the earlier debt. And accordingly in that

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(b) p. 52.

case it was held, that, the debtor having made no appropriation at the time of payment, the creditor had a right to appropriate a payment made generally to a debt barred by the Statute of Limitation. Nay, in one case it was decided, that an attorney, who had done work for a corporation without a retainer under seal, might appropriate a general payment to the work so done; though the court held at the same time that he could not have recovered payment in an action. Where there are distinct demands, one against a firm, and the other against one only of the partners, if the money paid be the money of the partners, and be not specifically appropriated by the payer, the creditor must not, and the law will not, apply it to the demand upon the individual; for that would be to pay the debt of one with the money of others. And though, where prior demands are equitable, and subsequent ones legal, the creditor may apply a general payment to the former, yet, if the prior ones be legal, and the subsequent equitable, the Courts will not allow a general payment to be appropriated, at the time of the trial to the latter. Nor will an appropriation be allowed, which would deprive the party paying of a benefit, such as the taxation of costs; and therefore an attorney cannot apply a general payment to the taxable items of his bill only. If some of the demands be illegal, a general payment will be applied to the legal demand; but where an Act of Parliament does not render a particular species of contract illegal, but only prohibits the enforcement of it by action, there a creditor may appropriate a general payment to a demand arising out of such a contract. When the same broker sold goods of A. and goods of B, to the payer, a general payment, if insufficient to discharge both debts, must be applied proportionably to them both. An intention on the part of the debtor to appropriate to a particular debt is perhaps more easily presumed in favour of a surety, where there are any circumstances which can be considered indicative thereof; but, in the absence of such circumstances the law, it seems, will not apply a payment in his favour."

§ 21. The Leading Case on appropriation of payments is *Clayton's Case*.<sup>(c)</sup> In that case Sir W. Grant, M. R. said.

"This state of the case has given rise to much discussion as to the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed in the first instance from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to

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(c) 1 Mer. 585.

be made at the time of payment, as well in the case of the creditor, as in that of the debtor, '*in re præsentī, hoc est statim, atque solutum est, cæterum postea non permittitur*' (Dig. lib. 46, tit. 3, § 1). If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, of the priority in which they were incurred. And, as it was the actual intention of the debtor that would in the first instance have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence therefore of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was consequently applied to the most burdensome debt; to one that carried interest, rather than to that which carried none; to one secured by a penalty rather than to that which rested on a simple stipulation; and, if the debts were equal, then to that which had been first contracted. '*In his, quæ præsentī die debentur, constat, quotiens indistinctè quid solvitur, in graviores causas videri solutum. Si autem nulla prægravat (id est, si omnia nomina similia fuerint), in antiquiores.*'" (Dig. lib. 46, tit. 3, § 5.)

"But it has been contended that, in this respect, our Courts have entirely reversed the principle of decision, and that in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; are at least that the creditor may at any time elect how the payments made to him shall retrospectively receive their application. There is certainly a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard v. Cox*, 2 Stra. 1194; by *Wilkinson v. Sterne*, 9 Mod. 427; by the ruling of the Lord Chief Baron in *Newmarch v. Clay*, 14 East, 239; and by *Peters v. Anderson*, 5 Taunt. 596, in the Common Pleas. From these cases I should collect, that a proposition which, in one sense of it, is indisputably true, namely, that if the debtor does not apply the payment, the creditor may make the application to what debt he pleases, has been extended much beyond its original meaning, so as, in general, to authorize the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing the rules of Law to operate where no express declaration is then made."

§ 22. Hence we learn that the Debtor has the first option of appropriation, or as the Roman Law termed it, *imputation* of a payment made by him to his creditor.

"*Quotiens*," says the Digest, l. xl. vi. tit. 3 l. 1., "*quis debitor ex pluribus causis, unum debitum solvit, est in arbitrio solventis dicere quod potius debitum voluerit solutum, et quod dixerit, id erit solutum.*"

So in an anonymous case in *Cro. Eliz.* 68, where the defendant owed the plaintiff certain money upon a bond, and certain money for wares sold, as it appeared by his book. At the day when the money became due upon the bond, the defendant duly tendered the money according to the bond; the plaintiff accepted it, and said it should be for the debt due by his book, and not for the other debt; but the defendant said he paid it upon his bond and not otherwise; and the plaintiff crossed his book pretending the book debt to be discharged, and brought an action of debt upon the bond. And it was adjudged against him; for it was said "the payment is to be in that manner that the defendant would pay it, and not according to the words of the plaintiff how he would accept it."

§ 23. Where there is no express direction from the debtor, his intention to appropriate it to a particular debt may be inferred from a consideration of the course which his interest would induce him to pursue. Thus when two debts are owing, one of which is barred by the Statute of Limitation, it is a fair inference that a payment is intended to be made on account of the debt not barred by the Statute. Thus in *Nash v. Hodgson*.<sup>(d)</sup> Lord *Cranworth*, L. Ch. said,

"What I deduce from the authorities is, that where a payment is made as principal, the effect of it will be to take out of the operation of the statute any debt which it is not barred at the time of payment, but that it will not revive a debt which is then barred; and that where there are several debts, the inference will be that the payment is to be attributed to those not barred. What may be the effect where there is a single debt consisting of several items, some of which are barred and some not, may be doubtful. Exactly the same principle applies if the payment is made in respect of interest."

§ 24. Where the debtor does not appropriate, the creditor may. The rule of the Roman Law was,

"*Quotiens non dicimus id quod solutum sit, in arbitrio est accipientis cui potius debito acceptum ferat.*"<sup>(e)</sup>

But our Law differs from the Roman, in not requiring this

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<sup>(d)</sup> 19 Jur. p. 946.

<sup>(e)</sup> Dig. l. xivi. tit. 3 l. 1.



appropriation to be *immediate*. The creditor may appropriate to any debt he pleases, at any time before the case comes on for trial. Where there are two debts, one of which is unlawful, the creditor may not appropriate to the unlawful debt. But it is otherwise, where one of two debts is only barred by Statute. In the Leading Case of *Mills v. Fowkes*,<sup>(f)</sup> *Tindal*, C. J. said :—

“As there was no appropriation, nor any evidence of an intention on the part of the debtor to apply the payment in part discharge of one of the earlier items, I think it has not the effect of exempting them from the operation of the statute. Then comes the question, has the plaintiff a right to apply that payment in satisfaction of the prior debt barred by the statute? For, though the plaintiff is bound by the statute with respect to his right to sue the defendant, yet where the debtor has made no appropriation of the money, the law as to its application remains the same as before. The civil law, it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the law of England the debtor may, in the first instance, appropriate the payment,—‘*solvitur in modum solventis*’; if he omit to do so, the creditor may make the appropriation; ‘*recipitur in modum recipientis*.’”

§ 25. Where neither debtor nor creditor appropriates, the Law decides the course of appropriation. It is, that the money shall be carried to the extinction of the earliest item due: not as in the Roman Law, the most burthensome. But this may be overcome by a course of dealing between the parties, or a stipulation to the contrary: for *modus et conventio vincunt legem*, of which the case of *Henniker v. Wigg*,<sup>(g)</sup> affords a good example.

There Lord Denman, C. J. in delivering judgment, said,

“It was contended that, as the bond was executed by some of the defendants on the 10th of January, and by all on the 12th, the sum of £1294. 6s. above noticed must, from the date, have included the £1000 to secure which the bond was given; that the whole formed one account, and that in ordinary banking, in which, according to the language of Sir W. Grant, Mr. R., all the sums paid in form one blended fund, the parts of which have no longer any separate existence; and that ‘it is the first item on the debit side of the account that is discharged or redu-

(f) 5 Bingh. n. l. 455.

(g) 4 Q. B. 792.

ced by the first item on the credit side,'<sup>(h)</sup> in which case the doctrine of Sir *W. Grant* was fully adopted. And it is presumed that, generally speaking, and with reference to a case like that which he was considering more especially, the doctrine of that eminent judge admits of no doubt. But it is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case."

§ 26. So money paid will be appropriated in the first instance in extinction of interest, and then of principal. So the Roman Law said,

"*Si neuter voluntatem suam expressit, prius in usuras, id quod solvitur, deinde in sortem accepto feretur.*"<sup>(i)</sup>

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(h) *Clayton's Case*, 1 Mer. 580, 572 and *Bodenham v. Purchase*, 2 B. & Ald. 39.

(i) Cod. l. viii. tit. 53 l. 1.

## TOPIC THE TWENTY-SECOND.

### LIEN.

*"For in behalf of trade and commerce, the law doth annex the condition that the bailee shall retain in certain cases; for men that get their livelihood by commerce, and by entertainment of others, cannot annex such disobliging conditions that they shall retain the bailor's property in case of non-payment, or make such disadvantageous and impudent suppositions that they shall not be paid; and therefore the law annexes such a condition, without any express agreement of the parties."*

BACON'S ABRIDGMENT.

§ 1. A lien is a right to retain property until a debt due to the person retaining it is paid.

§ 2. Liens are *particular* or *general*: the former exist in respect of the *particular* goods, for doing something to which the debt arises: and these are favoured by law.

§ 3. General Liens are those by which goods are retained for a *general* balance; and these are construed strictly.

§ 4. Liens arose from the law *compelling* a party to receive goods; and hence it was deemed only fair that he should be allowed to retain them until he was paid for the work which he had no power to decline doing. Thus an innkeeper, who is compelled to receive guests, has a lien on their goods for his bill; so of a carrier by land or sea: the rescuer of goods from the perils of the sea has a lien on them, on account of public policy; and by *usage*, liens have been created in various trades: they are also of course capable of being created by the express contract of the parties in any particular case.

§ 5. Where there is no express contract or usage, the Law has drawn this distinction. When there has been some alteration effected in the character of the goods by the labour of the bailee, he has a right of lien; otherwise not. A miller who grinds

corn, a shipwright who builds or repairs a ship, has a lien.<sup>(a)</sup> A stable keeper has not for the livery of a horse. And this distinction is well illustrated by the two cases of a livery stable keeper and a horse-trainer, the latter of whom has a lien. In the former case there has been no alteration in the character of the animal. The stable keeper has merely supplied food, lodging, and grooming. In the latter, the trainer has improved the animal's character and capabilities. He may have broken it in, and thus converted it from an ungovernable into a docile animal; he may have brought out its speed and its strength, and the like.

§ 6. Thus liens arise by usage, either by the custom of the trade, or by the previous course of dealing of the parties. "It has been decided,"<sup>(b)</sup> writes *Smith*, "that an attorney has a lien for his general balance on papers of his clients, which come to his hands in the course of his professional employment."<sup>(c)</sup> So a banker, who has advanced money to a customer, has a lien for his general balance upon securities belonging to such customer, which come into his hands, but not on muniments pledged for a specific sum, or left casually at his shop, after his own refusal to advance money on them, or negotiable instruments belonging to a third person left in the banker's hands by his customer. So it has been determined, that calico-printers, dyers, and wharfingers have liens for their general balance. but not fullers. However, notwithstanding these decisions, it does not appear certain that the right of lien may not, even with respect to some of the above trades, be hereafter contested, for the Court has remarked with respect to wharfingers, that there may be usage in one place varying from that which prevails in another; the party, therefore, claiming to retain goods for a general balance, should, in almost every instance, be prepared with evidence of the usage applicable to his own case. It is, however, established

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(a) But a shipwright is not entitled to be paid for the use of his dock while he detains a ship under a lien against the will of the owner. The law gives no right to add to a lien upon a chattel a charge for keeping it till the debt is paid. *Somes v. The British Empire Shipping Company*, 6 Jur. n. s. p. 781.

(b) *Smith's Merc. Law* 538.

(c) But an attorney has no lien for costs on real estate recovered by his exertions for his client. *Maw v. Neale*, 27 L. J. n. s. ch. 444.

too well for dispute, that a factor has a lien upon all goods in his hands as factor, for the balance of his general account; and even on the price of those, with the possession of which he has parted. Thus, where A consigned goods to B, a factor, to whom he owed more than their value, and B sold them to C to whom he was himself indebted, the factor having become bankrupt, it was decided that he had a lien on the whole price due from C, which must consequently be placed to the credit of his assignees, in winding up his account with C, and that A was not entitled to any portion of it. But a factor has not a lien for debts which accrued before his character as such commenced. Policy-brokers have also a general lien, and may avail themselves of it to obtain payment of the balance due to them from their employer, though he be merely an agent, if he did not disclose his principal; but not if they know, or there is enough to indicate to them, his representative character. Whether carriers have, by the usages of trade, a general lien, is a matter which has been of late years a good deal disputed: the prevailing opinion seems to be, that they have. But the master of a ship has no lien on the vessel or her freight, either for his wages or disbursements on her account."

§ 7. Where there has been, or is, no possession, there can at law be no lien: for lien is a right to retain. Thus where the goods are abandoned, the lien is gone. The original possession must be lawful, or no right of lien can arise. Thus a creditor cannot tortiously seize his debtor's goods, and then claim a right to retain them. And even where a general lien is recognized yet that will not apply to transactions where goods are held for a particular purpose.<sup>(d)</sup> The bailor has always a right to the restoration of the goods on payment of the price or the labour bestowed upon them, or his general balance, as the case may be; or upon tender of such sum: and if the bailee, when a tender is made, claims to retain the goods on some other ground than that of lien, he cannot afterwards set up his lien. The vendor of land and his representatives have a lien upon it for the unpaid purchase money, not only against the

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(d) *Bode v. Garrison*, 30 L. J. n. s. 37.

purchaser, but against his heirs and subsequent purchasers with notice. The vendee and those claiming under him are trustees for the vendör, for they ought not in conscience to get the estate without paying the full consideration for it.

§ 8. In accordance with this was the Roman Law. This is the language of the Institutes.

*Venditæ vero res, et traditæ, non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit; velut, ex promissore aut pignore dato. Sed, si is, qui vendidit, fidem emptoris sequutus fuerit, dicendum est, statim rem emptoris fieri. Quod vendidi, non aliter fit accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione.*<sup>(c)</sup>

§ 9. If the consideration money is expressed to be paid in the conveyance, and even a receipt endorsed on the back; or if a security is taken for the payment of the purchase money, the lien nevertheless exists, if in fact the money has not been paid.

§ 10. Therefore where one of several joint owners lays out his own money in repairs or improvements for the common benefit, he shall have a lien for the amount; <sup>(f)</sup> for *nemo debet locupletari ex alterius incommodo*<sup>(g)</sup>; and the rule is the same where the true owner stands by and sees improvements made by a person who has not himself notice of such owner's interests, without saying anything; for *jure nature æquum est, neminem cum alterius detrimento aut injuriâ fieri locupletiolem*.<sup>(h)</sup> The Hindu Law permits the mortgagee or tenant in possession to recover the value of improvements at the termination of his estate. There are other equitable liens which the state of the Law and society in this country render it unnecessary to notice.

(c) Inst. l. ii. t. l. § 41.

(f) Though at common Law a jointowner is not entitled to sue his jointowner for contribution on account of expenses which the former has voluntarily incurred, without any express stipulation or contract between them, for repairs &c., to the common property, yet the equitable doctrine of the Roman Law prevails in our Equity Courts. So in the Pandects (Dig; c. 10. t. 1 l. 12.) *Si ædes communes sint, aut panis communis, et cum reficere vel demolire vel in eum im-mittere quid opus set; communi dividendo judicio erit agendum, aut interdicto, uti possidetis, exprimur*.

(g) Dig. l. 50 t. 17 l. 206.

(h) Dig. l. 50 l. 17 l. 206.

## TOPIC THE TWENTY-THIRD.

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### AGENCY.

*Qui facit per alium, facit per se.*

§ 1. An agent is a person authorized to do some act or acts in the name of another who is called his principal. An agent is the *Procurator* of the Roman law; the principal is the *Dominus*. *Procurator est qui aliena negotia mandata domini ministrat.*<sup>(a)</sup>

§ 2. It is a general rule that an agent, unless specially empowered, cannot substitute another in his place; for the law is *Delegata potestas non potest delegari: vicarius non habet vicarium. Procurator alium procuratorem facere non possit.* The relation is founded in confidence; and the principal ought not to have a party thrust upon him of whom he knows nothing, and who may not be to his liking. At the same time this rule does not prevent the agent from employing all such instruments as are necessary for the due performance of his duty; for all such power is tacitly implied: *cuiusque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit.* And that, even though the authority may not contain any express mention of such power: *Expressio eorum quae tacite insunt nihil operatur: and Quod subintelligitur non deest.*

§ 3. An agent may be appointed by bare words, or his agency may be inferred from the conduct of his supposed principal concerning him. Agency may be general or special; limited or unlimited; no particular form of appointment is necessary. *Procurator constitutus est vel coram vel per nuncium, vel per epistolam.*

§ 4. The division of *Smith* in his *Mercantile Law* may be most conveniently followed here. He treats of the mutual rights

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(a) Dig. l. 3 tit. 3, l. 1.

of the agent and his principal ; of the mutual rights of principals and third parties ; and of the mutual rights of agents and third parties. Each of these heads is considered with reference to the rights of the one party against the other ; and hence a six-fold division of the subject.

§ 5. *The rights of principal against agent.* The fiduciary relation of the parties calls for *uberrima fides*. Whatever be the character of the duties, the agent is to fulfil them to the letter, if possible. So the Roman Law. "*Igitur commodissime illa forma in mandatis servanda est, ut, quotiens certum mandatum sit, recedi a formâ non debeat. Diligenter fines mandati custodiendi sunt ; nam qui excessit, aliud quid facere videtur.*" He must employ skill ; for if he engage without it, he is a deceiver. *Imperitia culpæ admuneratur : spondet peritiam artis : spondet diligentiam agendo negotia parem.*<sup>(b)</sup> If he exceed his authority, loss will fall upon him ; while he must account to his employer for all profits. *Procurator, ut in cæteris quoque negotiis gerendis, ita et in litibus, ex bonâ fide rationem reddere debet. Itaque, quod ex lite consecutus erit, sive principaliter ipsius rei nomine, sive extrinsecus ob eam rem debet mandati iudicio restituere.* He cannot dispute the title of his principal ; he must keep a clear account ; and communicate all results to his principal. When loss occurs through his negligence, or additional expense has been incurred, which but for such negligence might have been avoided, he will have to bear it. So the Roman Law.

"*Si mihi mandaveras, ut rem tibi aliquam emam, egoque emero meo pretio, habebō mandati actionem de pretio recuperando. Sed et si tuo pretio, impendero tamen aliquid bonâ fide ad emptionem rei, erit contraria mandati actio, aut si rem emptam nolis recipere. Simili modo, et si quod aliud mandaveris, et in id sumptum fecero. Impendia, mandati exsequendi gratiâ facta, si bonâ fide facta sunt, restitui omnimodo debent ; nec ad rem pertinet, quod is, qui mandasset, potuisset, si ipse negotium gereret, minus impendere. Sumptus bonâ fide necessario factos, etsi negotio finem adhibere procurator non potuit, iudicio mandati restitui necesse est. Si tamen nihil culpâ tuâ factum est, sumptus, quos in litem probabili ratione feceras, contraria mandati actione petere potes. Si quid procurator citra mandatum*

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(b) Dig C. 50 tit 17. l. 132.



*in voluptatem fecit, permittendum ei auferre, quod sine damno domini fiat, nisi rationem sumptus istius dominus admittit."*

An agent to sell, must insure goods if his principal requests, or if it has been the course of business to do so ; and if he cannot effect an insurance, he must inform his principal. He must sell for the price limited, where a price is limited ; or if not, for a fair market price ; he must not sell upon credit where the goods are ordinarily sold for cash only.

§ 6. *Del credere* agents, however, who are paid an extra remuneration for insuring payment of goods intrusted to them for sale, may of course sell for credit. They are however only sureties, and cannot be resorted to by the principal for payment in the first instance, before the purchaser has failed to pay.<sup>(c)</sup>

§ 7. One of an agent's main duties is to keep a true and clear account. Courts of Equity, writes *Story*,<sup>(d)</sup> adopt very enlarged views in regard to the rights and duties of agents ; and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility, or of obtaining undue recompense. If, therefore, an agent does not, under such circumstances, keep regular accounts and vouchers, he will not be allowed the compensation which otherwise would belong to his agency.<sup>(e)</sup> Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own : if he mixes it up with his own, the whole will be taken both at Law and in Equity to be the property of the principal, until the agent puts the subject matter under such circumstances, that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part.<sup>(f)</sup> In other words, the agent is put to the necessity of showing clearly what part of the property

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(c) In strictness he is not a surety. No note is necessary to bind him. The principal need not sue the purchaser before having recourse to the *del credere* agent. It is sufficient if he fails to pay.

(d) Eq. Jur. § 468.

(e) *White v. Lady Lincoln*, 8 Ves. 363.

(f) *Lupton v. White*, 15 Ves. 436, 440.

belongs to him, and so far as he is unable to do this, it is treated as the property of his principal.<sup>(g)</sup> Courts of Equity do not in these cases proceed upon the notion, that strict justice is done between the parties ; but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal.<sup>(h)</sup>

§ 8. Agents for purchase must follow instructions, or the principal may repudiate the transaction ; but the principal must give notice of such repudiation to the agent within a reasonable time.

§ 9. *Rights of Agent against Principal.* He is entitled to remuneration, ordinarily called *commission*, fixed sometimes by special agreement, sometimes by the usage of trade. But if his employment be illegal, he cannot enforce payment, for the law will not assist him. He may forfeit it by misconduct, such as neglect, want of skill, and the like. He is entitled to be reimbursed all advances made by him in the regular course of his business : such as charges for duties, ware-housing &c. ; but charges occasioned by his own neglect are not within the regular course of employment. Where he acts *bond fide*, he is not liable to his Principal for the result of contracts entered into on his behalf. *Resbourn v. Bruckner*.<sup>(i)</sup> And on the other hand he is entitled to be indemnified for any liability incurred by him consequent on his employment. *Warton v. Harrison*.<sup>(j)</sup>

§ 10. *Rights of third persons against Principal.* As far as the agent's authority extends, he can bind his principal to third persons. The extent of an agent's authority is to be measured by the extent of his usual employment.

" For he," writes *Smith*<sup>(k)</sup> " who accredits another by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether the employer intended to

(g) *Panton v. Panton*, cited 15 Ves. 440 ; *Chadworth v. Edwards*, 8 Ves. 46.

(h) *Lupton v. White*, 15 Ves. 441.

(i) 27 L. J. n. s. Exch. : 90.

(j) 29 L. J. n. s. Q. B. 14.

(k) Mer. L. p. 134.

authorise them or not ; since, where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer. On this principle it is, that one partner can bind another to contracts within the scope of the partnership business ; the same principle is well illustrated by Lord *C. J. Holt*, who says, ' If a man send his servant with ready money to buy goods, and the servant buy upon credit, the master is not chargeable. But if the servant usually buy for the master upon tick, and the servant buy some things without the master's order, yet, if the master were trusted by the trader, he is liable.' "

And in such cases the Principal is liable though the goods be misapplied by the agent. *Summers v. Solomon*.<sup>(1)</sup>

§ 11. " As the employment" writes Mr. *Smith*<sup>(2)</sup> " is the measure of the authority to be inferred, if there were no previous employment, there can of course be no inference of authority : in such a case, the party who trusts a servant does it at his peril ; since the master will only be liable for what comes to his use ; and not even for that, if he gave his servant money to pay for it ; and, as the employment is the measure of the authority, an employment in one line of business affords no inference of authority to act in another ; and the authority must be inferred from facts which have occurred during the course of such employment, not from mere argument as to the utility or propriety of the agents possessing it.

" Thus, though a clerk or apprentice may have an implied authority to receive money for his master in the course of business, yet that will give him no authority to receive it in collateral transaction or out of the ordinary course of business. And thus also, though a master when abroad, or even at home, in case of necessity, has an implied authority to borrow money for the purposes of the ship, and may therefore bind his owner by contracting a loan for those purposes, yet, if he borrow money on his own account, and afterwards apply it to the purposes of the ship, that is no exercise of his authority, and his master is not bound to repay that money.

" It follows from the above observations, that an agent may be tied down by very strict directions, as between himself and principal, whom he may notwithstanding have power to bind by contracts unauthorised by and even in defiance of them. Cases of this sort occur, when a general agent, as he is called, exceeds his instructions. A general agent is a person whom a man puts in his place to transact all his business

(1) 3 Jur. n. s. 962.

(2) Mar. L. p. 136.

of a particular kind : thus, a man usually retains a factor to buy and sell all goods, and a broker to negotiate all contracts of a certain description, an attorney to transact all his legal business, a master to perform all things relating to the usual employment of his ship, and so in other instances. The authority of such an agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, i. e. an agent employed specially in one single transaction ; for it is the duty of the party dealing with such a one, to ascertain the extent of his authority ; and if he do not he must abide the consequences."

It must however be remembered that a Foreign Principal is in no case liable at the suit of a vendor for goods purchased by the agent at home. *Smyth v. Anderson*.<sup>(\*)</sup>

§ 12. The words of *Story* in his work on Agency are also worthy of study here.<sup>(o)</sup>

"Before quitting this subject of the nature and extent of the authority of agents, it seems proper to refer again to what has been already incidentally stated, the distinction commonly taken between the case of a general agent and that of a special agent, the former being appointed to act in his principal's affairs generally, and the latter to act concerning some particular object. In the former case, the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances. In the latter case, if the agent exceeds his special and limited authority conferred on him, the principal is not bound by his acts ; but they become mere nullities, so far as he is concerned ; unless, indeed he has held him out as possessing a more enlarged authority.

"The ground of this distinction is the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealings with agents. If a person is held out to third person, or to the public at large, by the principal as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds to

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(\*) 13 Jur. 211.

(o) § 126-7.

allow him to set up his own secret and private instructions to the agent, limiting that authority; and thus to defeat his act and transactions under the agency, when the party dealing with him had, and could have no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority: for he has held him out to the public as competent to do the acts, and to bind him thereby. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act, which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party, who has placed confidence in him. The maxim is founded in the soundest ethics, and is enforced to a large extent by Courts of Equity. Of course the maxim fails in its application, when the party dealing with the agent has a full knowledge of the private instructions of the agent, or that he is exceeding his authority."

§ 13. When a principal adopts the acts of his agent which he had not originally authorized, third parties may pursue the principal; for *omnis ratihabitio retro-trahitur et mandato priori æquiparatur*.

§ 14. As to the power of an agent to bind his principal by the disposition of his property:

"The common law rule" writes *Smith, (p)* "was, as may be collected from the foregoing observations, that to acquire a good title to the employer's property by purchasing it from his agent such purchase must have been in market overt and without knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions. The reason of this is clear; for unless the transaction took place *bonâ fide* or in a market overt (in which case a peculiar rule of law steps in for its protection) an agent selling without express authority must, that his act might be supported, have sold under an implied one. But we have seen that an implied authority always empowers the person authorised to act in the usual course of his employment; consequently, if he sold in an unusual mode, he could have no implied authority to support his act; and as he had no express one, his sale of course fell to the ground. For instance, the usual employment of a factor being to sell,

it was repeatedly decided that he could not pledge the goods entrusted to him."

The case of *The Bank of Bengal v. Macleod*<sup>(2)</sup> affords a good illustration of the power which an agent has to bind his principal to third parties. The payee of promissory notes of the East India Company, by a power of attorney, authorized his agents at Calcutta to "sell, endorse, and assign" the notes. These notes were transferable by endorsement, payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of Bengal offering, as security, these promissory notes. The Bank made the advance, and the agents endorsed the notes, such endorsement purporting to be as attorney for their principal, and deposited them with the Bank, by way of collateral security for their personal liability, at the same time authorising the Bank, in default of payment, to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, and default having been made in payment, the Bank sold the notes, and realised the amount of their loan.

It was held, that the endorsement of the notes by the agents of the payee to the Bank was within the scope of the authority given to them by the power of attorney, and that the payee could not recover in detinue against the Bank.

"The main and fundamental question," said Lord Brougham in delivering the judgment of the Court, is,—

"Had *Macleod & Co.* authority to endorse under the power of attorney? Which is in the same words in both cases.

"It is to 'sell, endorse and assign, or to receive payment of the principal according to the course of the Treasury—and to receive the consideration-money and give a receipt for the same.' It is contended for the Respondent, that the words, 'sell, endorse and assign,' used conjunctively, cannot be used in the disjunctive, but that the only power given to endorse is one ancillary to sale, and that we are to read it, as if it were, power to sell, and for the purposes of selling, to endorse. This construction is endeavoured to be supported by referring to the variation of 'or' for 'and' immediately following—'or to receive the

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(2) 5 Moore's L. App. p. 1.

money at the Treasury.' We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. The matter first dealt with, is the use of the paper as a continuing and subsisting instrument, as securities not paid off; the matter afterwards dealt with, is the receiving of the money due on these securities, when paid off, and when they ceased to exist—it is called 'payment of the principal,' and then follows a like power to receive the consideration-money, and give receipts; that is, to receive the money, and give receipts for the money arising from the sale, endorsement, and assignment, because to that alone could this clause apply—the giving up the paper to the Treasury, authorised by the second clause, requiring no receipt whatever.

"The change of 'and' for 'or' in the second clause does not, therefore, appear at all to alter or affect the construction of the first clause or member of the sentence. Shall we, then, say, that a power to 'sell, endorse and assign,' does not mean, a power to sell, a power to endorse, and a power to assign? And would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction, we must hold, that these words not only give no powers to endorse, without selling, but also, that they give no power to sell without endorsing, and we must suppose the agent acting under such a power to be entirely crippled. Now, as there can be no doubt that this is a general form for powers of attorney to deal with negotiable instruments, and that in the general case, whatever may have been the understanding in the case at the Bar, the power to endorse is intended to be conveyed. Were we to adopt the Respondent's construction, we should sanction this position, not only that all powers now existing and acted on, and which have been acted on, if conceived in this form, are most defective, indeed, almost inoperative, and that what has been done under them, and is now done under them, is insufficient to convey a title to the taker of the negotiable instrument, but that in future, to make such powers complete, indeed, to render them useful, a new and very tautologous phraseology must be adopted, as this 'power to sell, and also to endorse, and also assign, or to endorse without selling, or to assign without selling or endorsing, or to sell without endorsing,' and so forth. It appears to us, that the rational and the natural construction is the one which represents a power 'to sell, endorse, and assign,' as a power to sell, a power to endorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally. The elliptical mode of expression, by not repeating the words 'a power,'

or 'full power,' we consider to be thus properly supplied, and the expression thus justly expounded in the ordinary mode of parlance."

"But it is said, that the power was given to do the acts in question on the donor's behalf. This is really only saying, that what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said, that even if the expression be read as only amounting to this, the endorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the endorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the endorsee's title must depend upon the authority of the endorser, it cannot be made to depend upon the purposes for which the endorser performs his act under the power."

§ 15. The decisions on this power of disposition by agents working a hardship on merchant's credit, the Factors Act was passed (6 Geo. 4. c. 49.) and subsequently 5 and 6 Vic. c. 39 called the New Factor's Act. Both these Acts are extended to this country; the former by Act XIII of 1840: and the latter by XX of 1844; but they only apply to cases governed by English law, and I shall therefore not pursue the subject at any length here.

§ 16. The following brief summary of the operation of the Factors Acts taken from *Chitty on Contracts*(\*) may however not be out of place.

"1st. An agent who is intrusted with the possession either of goods or of the documents of title to goods, may now deposit the same by way of pledge, lien or security for advances made to himself; even although at the time of making the advances the pawnee knew that the pawner was only an agent. But the pawnee is not entitled to the protection of this enactment, if the deposit was made on account of an antecedent debt; or if the advance was not made *bonâ fide* on the part of the pawnee; or if he had notice that the agent had no authority to pledge, or that, in so doing, he was acting *mala fide* with reference to his principal.

"2nd. Where the advance is made *bonâ fide*, not on account of an immediate deposit, but in consideration of a written contract to deposit



goods or documents of title, notice to the pawnee of the agent's want of authority to make such deposit, will not invalidate the contract, unless to be received by him before the goods or documents of title have been actually deposited with him.

"3rd. Where the agent is possessed of any document of title to goods, he will be taken to have been intrusted therewith, so as to be entitled to pledge the same, whether such document was derived immediately from the owner, or has been obtained by the agent by reason of his having been intrusted with the possession of the goods, or of some other document of title thereto.

"4th. The agent may make a valid pledge, either for an original or a continuing advance. And where an advance has been already made to an agent on the security of goods, documents of title, or negotiable instruments, and these are given up in consideration of the deposit by the agent of other goods, &c., the pledgee will have a lien on this second deposit to the extent of the value of the goods, &c. given up in consideration thereof.

"5th. It would seem that an agent may pledge the property of his principal for an antecedent debt, to the extent of his own lien thereon at the time of the pledge, provided the pawnee has not, at that time, notice that the pawner is an agent. And lastly, there seems to be no doubt that the principal will be bound by a pledge by his agent of negotiable securities, such as bills or notes indorsed in blank, or exchequer bills payable to bearer, or bonds payable to holder.

"But it has been decided, that the 5 & 6 Vic. c. 39, s. 1. is intended to protect only bona fide advances to the agent. And, therefore, where the agent and the defendant were jointly liable on a bill for £300, and the defendant paid that sum to the agent to take up the bill, and took, as a security, a deposit of goods belonging to this plaintiff, which were then in the agent's hands: it was held, that the transaction was not a loan to the agent at all; and that it was not protected by the statute."

§ 17. The consequence of dealing with an agent when the principal is undisclosed at the time of the transaction, is very neatly put in *Smith's Mercantile Law*. The leading cases are *Patterson v. Gandasequi*. *Addison v. Gandasequi*. *Thompson v. Davenport*, and *George v. Claggett*, which may all be consulted in the Second Volume of *Mr. Smith's Leading Cases*, with the invaluable notes attached to them respectively. Here it must

suffice to furnish the reader with the same author's condensed summary of the law as it is established by those cases, and the subsequent decisions which have followed upon them.

"When," he writes<sup>(e)</sup>, "an agent, having a proper authority purchases in the name of his principal, it is clear, from what has been said, that the principal is bound to the vendor: if, however, the vendor, preferring the credit of the agent to that of the principal, agree with the former to accept him as his debtor instead of the latter, he cannot afterwards alter his election, and turn round and charge the principal. But it often happens, that a broker purchases in his own name, without disclosing that he has any principal: where this takes place, the broker is, of course, the person to whom the vendor gives credit; yet, if he afterwards discover the principal, he may elect to abandon the responsibility of his broker, and charge him: and so he may, if the broker, on making the purchase, stated himself to be an agent, but omitted to state the name of his principal, which is afterwards discovered: unless, in either of these cases, the seller have suffered the time for payment to elapse, and the principal to alter the state of his account with the broker in such a manner that he would be a loser if called on to pay to the seller, for then, indeed, sooner than that the principal should be injured, the seller will be taken to have selected the agent for his debtor. But if the time for payment have not elapsed, the principal cannot, by prematurely settling with his agent, deprive the seller of his election. It seems also to be a rule, that whenever the agent is an English, and the principal a foreign merchant, the seller will be considered as having given credit to the Englishman, and that he and not the foreigner is liable."

§ 18. Payment, or tender of payment, to an agent in the course of his employment, is payment or tender of payment to the principal.

"It is a general rule of law, that, if a creditor employ an agent to receive money of a debtor, and the agent receives it the debtor is discharged as against the principal; but if the agent, instead of receiving money, write off money due from him to the debtor, then the latter is not discharged."<sup>(f)</sup>

When landed property is sold by auctioneers, the purchaser must strictly adhere to the conditions of sale. In the absence

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(e) Mercantile Law, p. 150.

(f) Mercantile Law, p. 154.

of express stipulation to the contrary the purchase money must be paid the vendor, and the vendor has ordinarily a right to have the assignment executed in his presence.

§ 19. Hitherto we have been considering contracts. The question remains how far the principal will be liable for his agent's torts. Where he orders or ratifies them, he is of course responsible: though the agent is not excused; for, says *Blackstone* "he is only to obey his master in matters that are lawful and honest."

§ 20. He is responsible for the negligence of his agent. Illustrations of this principle frequently occur in the law of master and servant. The leading cases on this are *Laugher v. Pointer*<sup>(u)</sup> and *Quarman v. Burnett*.<sup>(v)</sup>

In the first of these cases it was held that where the owner of a carriage hired of a stable-keeper a pair of horses to drive it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person: the owner of the carriage was not liable to be sued for such injury, *Bayley* and *Holroyd* Js. dissenting.

If the second, where the owners of a carriage were in the habit of hiring horses from the same person, to draw it for a day or drive, and the owner of the horses provided a driver, through whose negligence an injury was done to a third party, it was held that the owners of the carriage were not liable to be sued for such injury.

And it was held to make no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery, which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house.

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(u) 5 B. & C. 547.

(v) 6 M. & W. 499.

In these cases the driver was the servant or agent of the owner of the horses, not of the hirer; and the owner of the horses would have been liable, had he been sued. *Parke B.* in his judgment in *Quarman v. Burnett* said,

"That person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who selected him as his servant from the knowledge of or belief in his skill and care, and who may remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another. Consequently a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person in carrying into execution that which that other person has contracted to do for his benefit."

§ 21. This leads us to observe that it is very necessary to bear in mind the distinction between the relation of master and servant and that of Employer and contractor.

The case of *Sadler v. Henlock*<sup>(w)</sup> affords a good illustration of the difference. Defendant employed P., who was a labourer skilled in the construction of drains, to clear out a drain, which carried off water from his garden across and under a public highway, and paid him 5s. for the job. Defendant did not interfere, nor direct the manner of doing the work. In an action against defendant for an injury caused to plaintiff's horse by the negligent manner in which the work was done. It was held, that the relationship of master and servant existed between defendant and P., and therefore defendant was liable.

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(w) 1 Jur. n. s. p. 679.

But in delivering judgment, Lord *Campbell* said,

"The real question, is what was the relation that subsisted between the defendant and *Pearson*. . . . Whether the defendant is liable or not for the negligence depends upon whether *Pearson* is to be considered as his servant at the time. If a domestic servant in the regular employment of the defendant had been ordered by the defendant to go and clear out the drain, no doubt he would have rendered his master liable. What difference does it make, that instead of his domestic servant the defendant employs *Pearson*, a common labourer, to do the job? The defendant might have superintended the job and given directions until the work was completed; and if so, *Pearson* was his servant pro hac vice, and the defendant liable as master. Consistently with the case of *Peasey v. Rowland*, (13 C. B. 182), and the other cases, I think the relationship of master and servant existed, and for the mischief that arose from the negligence of the servant respondent superior." *Coleridge*, J., observed "that the defendant, by employing a person of skill in doing the particular work he is employed to do, relieved himself from actually superintending the particular work, but that the fact of employing a skilled person did not release him from the effect of such person's negligence, any more than if he employed a domestic servant." *Crompton*, J., seemed to think that the true test in such cases was, "whether the employer had any control over the persons employed; and whether the payment was by the day or piece could make no difference." "The defendant," continued his Lordship, "in this case could, during the progress of the work, overlook and direct what was to be done, and the manner of doing it, and it would be rather against common sense to say that a man employed in that way is a contractor. It is only on the ground of the relationship of employer and contractor being different from that of master and servant that I can understand the authorities."

The observations upon this case in the 19th Jurist, pt. 2. p. 425 may be usefully consulted here. The following distinctions are to be made as to the principles which ought to guide in cases of this nature.

First, what is the relationship that exists between the employer and employed. If it be that of master and servant, then the employer is liable; if that of employer and contractor, then he is not liable.

Secondly, that the true test to ascertain the relationship between the parties is, whether the employer has any control over the person employed; that is, whether the employer has the power of superintending the work, and directing it to be done in such manner as he pleases.

It is obvious that in cases where he has not such power, but the employed agrees to do the work, and the mode of performing it is under his absolute control, the relationship that exists between the parties is that of employer and contractor.

Thirdly, whether the party employed is competent and skilful is no true criterion; for in all cases of master and servant, of employer and contractor, it is for the interest of employers that they should engage the services of competent and skilful persons, and it is to be presumed that they naturally would do so.

The case of *Peachey v. Rowland*,<sup>(z)</sup> further illustrates our position. There the Defendants employed A. for a certain sum to fill in the earth over a drain constructed for them across a highway, from their house to the common sewer, the Defendants finding carts, if necessary, to remove the surplus earth, which were to be filled by A. A filled in the earth, but left it so heaped above the level of the road, that (there being neither light nor signal) the Plaintiff by night drove his carriage against it, and sustained injury therefrom. The only evidence of interference or control on the part of the Defendants was, that one of them a few days before the accident, and when the work was incomplete, had seen the earth heaped over a part of the drain, as it afterwards remained: and it was held, that there was no evidence to go to the Jury of the Defendants' liability; for that the wrong complained of was a Public Nuisance by A., which the Defendants (whether A. were their Servant or only a Contractor) had not authorised him to commit, having merely directed generally the doing of a thing, which might have been done without committing the Public Nuisance.

These two cases are reconciled at once by the distinction, that in the one case, the relationship was that of master and servant, in the other that of employer and contractor.

And the doctrine of the Roman Law is to be studied.

*Item exercitor navis, aut cauponas aut stabuli, de dolo aut furto, quod in navi, aut caupona, aut stabulo factum erit, quasi ex maleficio, teneri videtur, in modo ipsius nullum est maleficio, sed alicujus eorum, quorum opera navem aut cauponam aut stabulum exercet. Cum enim neque ex maleficio neque ex*

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(z) 17 Jur. 764.

*contractu, sit adversus cum constituta hæc actio, et aliquatenus culpæ reus est, quod opera malorum hominum uteretur, ideo, quasi ex maleficio, teneri videtur."*

§ 22. But a principal is never answerable for his agent's wilful and malicious trespass.

§ 23. Generally he is not criminally responsible for the act of his agent, unless he expressly ordered it. Then he will be an accessory before the fact, or a principal, according to the nature of the crime. What constitutes an accessory before the fact in felonies, will make a man a principal in treasons or in misdemeanours.

§ 24. According to the Roman Law ratification was equivalent to a command in criminal cases. *In maleficio ratihabitio mandato æquiparatur* says *Ulpian*; and *Cujacius* asks, if any one commits a murder for my sake and I ratify it afterwards, am I responsible for the murder? And he answers in the affirmative. Herein the Law of England differs; and wisely; for there is a wide distinction between the degrees of criminality of an accessory before and an accessory after the fact. In *R. v. Bainbridge*(<sup>b</sup>) it is laid down "that the offence of an accessory before the fact is of a much deeper dye than that of the accessory after the fact."

§ 25. An agent's power to pledge his principal will be determined by a revocation of authority published and known to parties formerly dealing with the agent on the footing of his authority, or by bare revocation to others: by renunciation accepted by the principal: by the death of the principal or agent, or by his bankruptcy.

§ 26. *Rights of principal against third parties.* The principal may adopt the act of his agent done without express authority. He may sue upon a contract made by his agent, in his own name.

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(<sup>b</sup>) 3 P. W. 440.

§ 27. But such right is subject to this rule, which is thus laid down by Smith.<sup>(2)</sup>

"That if the agent have been allowed to deal in his own name, the party dealing with him will enjoy the same rights against the employer as he might have exercised against his agent had that agent really been a principal. Thus, when a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and, though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This rule is to prevent the hardship under which a purchaser would labour, if after having been induced by peculiar consideration, such, for instance, as the consciousness of possessing a set-off, to deal with one man, he would be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted."

And the Leading case is that of *George v. Claggett*<sup>(a)</sup>, which with the notes should be consulted. There it was held that if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

§ 28. *Rights of an agent against third parties.* He may in all cases in which he has a *special property* in the goods, sue, whether he contracted in his own name or not. Thus an auctioneer may sue for the price of goods sold by him. So an agent may sue for injuries done to the principal's goods while in his possession. But here he sues as trustee for his principal.

§ 29. An agent may always sue on contracts entered into in his own name for an undisclosed principal, or where a third party is named, who is merely fictitious; and the seeming agent is in reality his own principal.

§ 30. *Rights of third parties against agent.* An agent con-

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(2) *Mercantile Law*, 163.

(a) 2 *Smith L. C.* 95.



tracting for a known and responsible employer incurs no liability. Here the maxim *respondeat superior* always applies.

§ 31. If an agent says *Smith*,<sup>(b)</sup>

"Contract without naming any principal he is himself the person *prima facie* responsible; and though the other party may, in most cases, elect to charge the employer on discovering him, yet he need not do so but may, if he please, continue to look to the agent; and the rule is the same, at least as far as the agent's liability is concerned, where, at the time of contracting, he states himself to be an agent, but does not disclose his principal."

§ 32. It may be useful here to consider the cases in which an agent, signing as such, has nevertheless been held personally responsible. Great caution should be exercised by the agent to exclude his own liability, and he cannot be too careful in making this point fully understood by the parties with whom he deals.

I. When on the face of the agreement the agent signed as such, but without naming the freighter, and stipulated "that the agreement being concluded on behalf of another party, all responsibility on his part should cease on the cargo being shipped," and he turned out to be himself the principal, he was held liable on the agreement.<sup>(c)</sup> But the party negating the agency must prove that the defendant is principal.<sup>(d)</sup>

II. When an agent mentions the name of his principal, he may either have had no authority, or his original authority may have ceased without his knowledge. In the latter of these two cases he is not liable.<sup>(e)</sup> But if he never had any authority, he will be liable, whether he act fraudulently to deceive, or merely through misapprehension.

III. When an agent is authorized to contract, he may do so in such a manner as to lead to a claim being set up against himself personally. In all such cases "whether the agent contracted as such or not, is a question of fact, and not a conclusion of law. Each case must depend on its own circumstances."<sup>(f)</sup>

(b) *Mercantile Law*, p. 169.

(d) *Carr v. Jackson*, 7. Exch. 382.

(c) *Schmalze v. Avey*, 16 Q. B. 635.

(e) *Smout v. Ilbery*, 10 M. & W. p. 1.

(f) *Green v. Kopke*, 2 Jur. n. s. p. 1050.

IV. A mere statement in the body of the agreement that he is agent will not secure him unless he also sign as such.<sup>(g)</sup> If some of the stipulations in the agreement are to be performed by the agent himself, the inference of personal liability is more easily drawn<sup>(h)</sup>; or when it is so framed that the supposed principal is not bound.<sup>(i)</sup> *A fortiori* when the act could only be done by the principal, even when the agent did not sign as agent, but simply in his own name.<sup>(j)</sup>

V. It is generally conclusive in favour of Defendant that he signed *per* procuration, or on behalf of, or as agent for the principal, naming him.<sup>(k)</sup>

VI. Questions may arise as to varying the terms of the agreement by parol testimony, as to which see *Norton's Law of Evidence* § 629,630. But the policy of the Law in this respect has somewhat altered: and the real question will always be what was the intention of the parties; was it that the agent should be responsible or not. In equity the real situation of the parties could always be shown. Thus that a party signing as Principal was intended only to be a surety; and now that equitable defences are admissible in an action at Law, the practical effect is that, though an agreement may be only signed by an agent in his own name, by a properly pleaded defence the question may always be raised; what was his real position to the knowledge and according to the intention of the contracting parties, without reference to the form of the instrument or of the signature. Thus in *The Mutual Loan Fund Association v. Ludlow*,<sup>(l)</sup> where the Defendant had signed a promissory note simply in his own name, he was allowed to show that he in fact signed it as surety to the knowledge of the Plaintiff: and see the same point. *Greenough v. McClelland*.<sup>(m)</sup>

§ 33. If an agent exceed his authority, so that his princi-

(g) *Ooke v. Wilson*, 2 Jur. n. s. 1095.

(h) *Tanner v. Christian*, 4 El. & Bl. 591.

(i) *Wilson v. Zuleta*, 14 Q. B. 405.

(j) *Lewis v. Nicholson*, 31 L. J. Q.B. 311, and see *Downman v. Williams*, 7 Q.B. 103.

(k) *Jenkins v. Henderson*, B. Q. B. 744, see also *Deslands v. Gregory*, 6 n. s. 483 affd. p. 651, *Ogilvy v. Yglesias*, B. Q. B. 930.

(l) 5 Jur. n. s. p. 338.

(m) 6 Jur. n. s. 772.

ple is not bound, he will be responsible for any loss to the third party, even if innocent of intention to defraud.

§ 34. Where an agent has once, without notice to the contrary, paid over money to his principal under circumstances which would entitle the third party to recover it from the principal, such payment will be a conclusive answer to an action brought by the third party against the agent. Here again *repondeat superior* applies. But in *Cox v. Prentice*,<sup>(n)</sup> writes Smith,

"It was laid down by the Court, on the authority of *Buller v. Harrison*,<sup>(o)</sup> that an agent who receives money for his principal is liable as a principal, so long as he stands in his original situation, and until there has been a change in circumstances by his having paid over the money to his principal, or done what is equivalent to it. In that case the defendant received a bar of silver from his principal, and sold it to the plaintiff, at a price calculated with reference to the number of ounces which, on assay, it was thought to contain; it turned out afterwards, that it contained fewer ounces than had been supposed, and the plaintiff was held entitled to recover the money overpaid from the defendant, who had not yet handed it to his principal, although he had forwarded an account to him, in which he was credited with the full sum, but which was still unsettled. In *Buller v. Harrison*, the defendant was an insurance broker, and the money sought to be recovered was paid by the Plaintiff, an under-writer in discharge of a loss which turned out to be foul. It will be deserved, that in neither of these cases could the principal himself ever by possibility have claimed to retain the money for a single instant had it reached his hands the payment having been made by the plaintiff under pure mistake of facts, and being void abinitio, as soon as that mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money, any more than the factor of J. S. of Jamaica, who has received money paid to him under the supposition of his employer being J. S. of Trinidad, would be estopped from retaining that money against his employer, in order to return it to the person who paid it to him. Besides which in *Buller v. Harrison* had the agent paid the money he received from the under-writer, in discharge of the foul loss, over to his principal, he would have rendered himself an instrument of fraud which, as we have already seen, no agent can be obliged to do

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(n) Smith's Mercantile Law, 172.

(o) 3. M. & S. 344.

Except in such cases as these, the maxim *respondeat superior* has been applied, and the agent held responsible to no one but his principal."

§ 35. The recent case of *Holland v. Russell*(p) affords a good instance. There the defendant, as agent for the foreign owners, effected a policy of insurance on a ship with the plaintiff and other persons for one year. In the policy the defendant appeared as principal, but the plaintiff knew that he was only an agent. At the time of effecting the policy the defendant was in possession of a letter from the captain, which he did not communicate to the plaintiff, and the non-communication of which rendered the policy voidable. The ship was lost, and large sums of money were paid to the defendant on account of the policy, and by the plaintiff amongst others. The plaintiff paid his share in ignorance of the fact that the policy was voidable for the reason above stated. When he discovered it he claimed back his money. At that time the defendant had actually paid over the greater part of the monies received by him on account of the insurance to his principals; but as to two sums of 607*l.* and 608*l.* respectively: the facts were these—the first had been applied, with the consent of the principals, to the payment of the costs of an action which had been brought by the agent unsuccessfully against another underwriter on the same policy; the second had been allowed by the principals in respect of a claim of the defendant against them for disbursements and commission, and these accounts had been conclusively settled. The action was brought by the plaintiff to recover the money paid by him under the policy, when the jury found that there was no intentional fraud on the part of the defendant, and the verdict was thereupon entered for the defendant:—This was held to be rightly done; for that as the defendant acted *bona fide*, and the policy was *voidable* only, and not void, he was not bound to retain the money in his hands; and that, having paid it over to his principals, on whose account he received it, he was discharged. It was also held that there was no difference between the sums of 607*l.* and 608*l.* and the sums actually paid over to the principals, as they had both

been applied in a manner to which the principals had given their conclusive assent.

§ 36. The dissolution of the relationship of principal and agent may be the result of the act of either the principal or the agent, or of the operation of law.

§ 37. Where there is a revocation of authority by the principal, or a renunciation of duty by the agent, the relationship is dissolved.

§ 38. Where the relationship is destroyed by efflux of time, or the happening of the very event by which it was originally limited; where there is a change in the condition of either party; where the death of either party happens; where the subject on which the agency operates ceases to exist; or where the execution of the duty is complete; the dissolution is by operation of law.

§ 39. A principal may revoke the authority when he pleases, if the authority has not been exercised by the agent, or not acted on to such an extent as to be binding on the parties; as where the agent has taken merely preliminary steps. But where third parties have assented to the acts of the agent, the authority is not revocable.

§ 40. Where the authority has been in part exercised, if the authority admits of severance, the principal may revoke as to the part yet unexecuted. Cases may arise where he will be bound to indemnify the agent. The rights of third parties are not affected by such revocation of the unexecuted part of the authority.

§ 41. The revocation will take effect from the time when it becomes known to the agent. As to third parties it will operate from the date of their notice.

§ 42. The revocation may be by writing, word of mouth, or implied from circumstances.

§ 43. Where the agent has an *interest* coupled with the authority, it is not revocable at the will of the principal.

A familiar illustration occurs in the case of produce of this country sent to England for sale, when the shipper draws bills on the Consignee for advances against the goods. Here, when the Consignee has paid, or accepted the Bills so as to become liable on their maturity, he has an interest in the goods coupled with an authority. Suppose the goods arrive to a falling market, and the course of business between the parties is, that the Consignee shall sell for the best price, the shipper cannot prevent the Consignee from selling, by any order to hold the goods until a better market can be obtained.

§ 44. A voluntary agent may renounce before he has executed his authority, or when he has partly executed it, without incurring any liability to pay damages to his principal. But where there is a valuable consideration for the agency, the agent by renunciation may make himself liable for any damages his principal may suffer.

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## TOPIC THE TWENTY-FOURTH.

### PARTNERSHIP.

*Societas est contractus, quo inter aliquos res aut operæ communicantur, lucri in commune faciendi gratiâ.*

JUSTINIAN.

§ 1. The true test of a partnership, the *Socetas* of the Roman law, is the participation by the parties concerned in the adventure in *profit*, as principals. Thus one partner may stipulate to be free from loss as between himself and his companions, which will not diminish his liability to strangers; and an agent may stipulate to be paid by a certain sum proportioned to the profits of his employers, or a certain portion of the fund, which includes the profits, in lieu of wages, and yet not be a partner, either as regards the concern or strangers. So also two or more may purchase goods jointly, with intent to divide them, without their becoming thereby partners.

§ 2. Illustrations of parties receiving remuneration actually out of the profits, without thereby being partners as regards third parties, and *a fortiori*, *inter sese*, will readily suggest themselves. Thus it is usual for seamen, engaged in the whale fishery, to be paid by a certain proportion of the proceeds of the voyage, which does not constitute them partners with their employers, or to the world. Thus factors often receive a commission out of profits, or a part of the whole price beyond a certain sum: yet they continue Agents. So where a lighterman agreed with the owner of the lighter to work it, and to receive half the gross earnings as remuneration, he was held not to be a partner.

§ 3. If it should be agreed that one party should take *all* the profits, it would not constitute a partnership. The Roman Jurists called such a transaction *Societas Leonina*, in reference

to the fable of the lion who entered into a contract with the other beasts to hunt, and appropriated the whole of the prey. Thus the Digest<sup>(a)</sup> said,

*" Societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentiret ; et hanc Societatem Leoninam solitum appellare. Et nos consentimus talem Societatem nullam esse, ut alter lucrum sentiret, alter vero nullum lucrum sed damnum sentiret ; Iniquissimum enim genus Societatis est, ex qua quis damnum, non etiam lucrum, spectet."*

§ 4. There must be something brought into the common stock : but each party need not bring in the same commodity, or in the same proportions. Thus capital may be subscribed in different ratios ; and one partner may bring in money, another labour, another connexion, and the like. *Societatem, uno pecuniam conferente, alio operam, posse contrahi, magis obtinuit*, is the language of the Digest.<sup>(b)</sup>

§ 5. A very fine distinction has been drawn, the wisdom of which has been severely questioned. It is said that if an agent agrees to be remunerated by a part of the profits as profits, that will render him a partner as regards strangers.

The leading case on this point is *Ex parte Hamper*,<sup>(c)</sup> in which Lord Eldon said :

" It is clearly settled, though I regret it, that if a man stipulates that he shall have as the reward of his labour, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner ; but if he agrees for a part of the profits as such, giving him a right to an account, he is, as to third persons, a partner."

And in *Waugh v. Carver*,<sup>(d)</sup> and the notes thereto the distinction is considered at length. Upon the whole, the cases justify us in concluding, that whenever it appears that the agreement was intended by the parties themselves as one of agency or service, but the agent or servant is to be remunerated by a portion of the profits, then the contract would be considered as between themselves one of agency, but as between them and

(a) l. 17. t. 2. § 29.

(c) 17 Ves : 102.

(b) C. IV. tit. 37. l. 1.

(d) 1 Sm : L. C. 726.



third persons, one of partnership. But that if the agent or servant is to be remunerated, not by a portion of the profits, but by part of a gross fund or stock which is not altogether composed of the profits, the contract, even as against third persons, where the parties do not hold themselves out to the world as partners, will be one of agency, although that fund or stock may include the profits, so that its value and the quantum of the agent's reward, will necessarily fluctuate with their fluctuation. There is a third case, that viz., in which the agent or servant is not to receive a part of the profits in specie, but a sum of money calculated in proportion to a given quantum of the profits.

§ 6. It would seem more reasonable to hold that in every case in which a party diminished the fund which is the proper security for the payment of the general creditors, he should have been held a partner as between himself and the world, whatever he might be as between himself and his employers; instead of refining upon the question whether the agreement gave the agent a right to call for an *account* of the *profits* of the adventure, and constituting this the criterion of partnership. This may be safely affirmed, that as between the party and third persons, whenever the party has held himself out as a partner, he is liable.

§ 7. It is not intended here to consider joint stock companies, but the ordinary cases of private partnership. These must be governed by the ordinary laws of contracts. The parties must be competent to contract, i. e. *sui juris*; and not married women, lunatics, alien enemies. An illegal undertaking cannot form the basis of a partnership; for the law will not enforce such contracts, from which *non oritur actio*.

§ 8. Partners are ostensible, and dormant or sleeping: those who take an active part in the concern; and those who merely share in the profits, without taking part in the business.

§ 9. Besides these, a man may make himself a nominal partner by his acts, even though he has no share in the pro-

fits, no real interest in the concern. This happens where he holds himself out to the world, or allows his name to be held out to the world, as that of a partner; in which case the law holds him responsible to persons who have had dealings with the firm of which he has held himself out as a member. For it would be monstrous that parties should be induced to give credit to a concern on the faith of the representations of a *Rothschild* or a *Sir Jamsetjee Jijibhoy*, that his fortune was liable for their demands, and then to find that the party on whose responsibility they had pinned their faith, and perhaps staked their fortunes, was a mere decoy duck. The principle of the well known case of *Pickard v. Sears*(e) here applies, that a man having averred one state of things, which has caused a third party to alter his condition, shall not afterwards be permitted to aver another state of circumstances, to the detriment of such third party. *Nemo potest mutare consilium in alterius detrimentum.*

§ 10. The same individual may be a partner in two or more different firms; but that will not make such firms partners: for *socius alterius non est socius meus*: or as *Ulpian* says, *Socii mei socius, meus non est*: for the consent of all concerned is necessary to the formation of every ordinary partnership, or the admission of any new partner. Thus the Roman law said,(f)

“*Qui admittitur socius, ei tantum socius est, qui admisit, et recte; cum enim societas consensu contrahitur, socius mihi esse non potest quem ego socium esse nolui—quid ergo si socius meus eum admisit? et soli socius est.*”

And an excellent illustration of this occurs in the case of the death of a partner, where except there be a stipulation providing for it, the executor is not allowed to occupy his testator's place. Unless the partners should consent, the share of the deceased must be ascertained and paid over; for *jus accrescendi inter mercatores locum non habet*. So also where a woman is one of the partners, her marriage will dissolve the partnership, rather than that her husband shall become a partner against the will of

(e) See Norton's Law of Evidence.

(f) Dig. xvii. 2. 10.

the other members of the firm. *La raison, says Potliet, est que les qualites personelles de chacun des associes entrent en consideration dans le contrat de societe.* Thus the Roman law said, *Nulla societas in aeternum coitio est. Nemo potest societatem heredi suo sic parere ut ipse socius sit. Pompeianus respondet societatem non posse ultra mortem porrigi.*<sup>(9)</sup> *Solvitur adhuc societas etiam morte socii ; quia qui societatem contrahit, certam personam sibi eligit. Sed et, si consensu plurium societas contracta sit, morte unius socii solvitur, etsi plures supersint ; nisi in eodem societate aliter convenerit.*

§ 11. No particular form of contract is required. It need not be in writing. It need not even be concluded by words. It may be inferred from the acts of the parties. Where Articles of agreement only are executed, but no formal agreement, Equity will see them specifically performed ; for Equity looks upon that as done which ought to be done to carry out the real intention of the parties.

§ 12. A partnership may be dissolved by efflux of time, as when the term for which it was created has expired, or the object for which it was created accomplished ; it may be dissolved at any time by mutual consent or by any special mode provided for in the articles. Courts of Equity can decree its dissolution, where the undertaking is impracticable, or one or more of the partners grossly guilty of misconduct. Where no term is agreed on, the partnership is at will, and any partner can terminate it at his option without notice to his co-partners : *cum aliquis renuntiavit societati, solvitur societas.* Bankruptcy, conviction of felony, death also dissolve it. But as against strangers, due notice of the dissolution, when not by death or the act of the law, must be given.

§ 13. Every partner is the agent of all the rest : and the doctrines with respect to agent and principal apply as between partners. Thus it has been accurately laid down "that each partner is the accredited agent of the rest, whether they be

(9) Dig. C. 17 l. 52, and the Institutes l. 3. l. 26, § 5.

active, nominal, or dormant, and has authority as such to bind them, either by simple contracts respecting the goods or business of the firm, or by negotiable instruments circulated in its behalf, to any person dealing bona fide." And in *Fox v. Cliften*,<sup>(h)</sup> *Tindal*, C. J. said,

"By the general rule of law, relating to partnerships in trade, each would then be liable to the debts of the whole company contracted in the course of the trade, a consequence, not confined to the law of this country, but extending generally throughout Europe; and founded, partly on the desire to favour commerce, that merchants in partnership might obtain more credit in the world; and, more especially, on the principle that the members of trading partnerships are constituted agents the one for the other, for entering into contracts connected with the business and concerns of the partnership; so that by the contracts of the agent all his principals are bound."

And in the Oration *pro Roscio*, *Cicero* said,

*"In rebus minoribus socium fallere, turpissimum est; neque injuria; propterea quod auxilium tibi se putat adjunxisse, qui cum altero rem communicavit. Ad cujus igitur fidem confugiet, cum per ejus fidem læditur, cui se commiserit. Atque ea sunt animadvertenda peccata maxime, quæ difficillima præcaventur. Tecli esse ad alienos possumus; intimi multa opertiora videant necesse est. Socium vero cavere qui possumus, quem etiam si metuimus, jus officii lædimus. Recte igitur majores eum, qui socium fefellisset, in virorum bonorum numero non putarunt haberi oportere."*

§ 14. But the act must be one respecting the partnership business. So in *ex parte Agace*<sup>(i)</sup> *Eyre*, C. J. said,

"In partnerships, both partners are authorized to treat for each other in every thing which concerns, or properly belongs to, the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances that may vary the case. On the other hand, when the transaction has no apparent relation to the partnership, then the presumption is the other way and the partnership will not be bound by the act of one of the partners without special circumstances."

And in *Sandilands v. Marsh*,<sup>(j)</sup> *Abbot*, C. J. said,

"It has, undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the other; but the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm,

(h) 6 Bing. 776.

(i) 2 Cox, 312.

(j) 2 B. and Al. 637.

will bind all the partners. Provided the contract have a sufficient relation to the business of the firm, and the contractor have, in other respects, acted *bond fide*, it matters not much what may be its description, or how grievous the contracting partner's fraud and misconduct: thus the firm is liable, whether it be a loan for his expenses while engaged in the partnership business or a purchase of goods such as might be used therein, but which he instantly converts to his own benefit; so they are bound by his sale or pledge of the joint property."

§ 15. As to negotiable instruments: these, to bind the firm, must be on its behalf. *Smith* deduces the various rules from the case of *Greenslade v. Dower*<sup>(k)</sup> in the following passage.

"These negotiable instruments must have been circulated on behalf of the firm. Now, it is clear, that, when the purposes of the firm do not require that its members should pass negotiable instruments, it is not very likely that such should be circulated in its behalf: in such cases, therefore, the implied authority of a partner fails, and the firm will not be bound by his negotiation. Hence, an attorney cannot bind his partner by a note, though given for the debt of the firm; and it has been decided, that partners in a farming or mining concern have no such authority. From the observations of the Judges in the case last cited, I think it may be collected:

"First, that partners in a trade, strictly mercantile have an authority implied by law to bind each other by bills or notes.

"Secondly, that partners in some peculiar business, such as farming and mining, have, *prima facie* no such authority.

"Thirdly, that this presumption against their authority may be rebutted, by showing, 1st, that the consultation and particular purposes of the firm are such as to render it, in their individual cases, necessary; or, 2ndly, that, though not necessary, it is, in other similar cases, usual; for if it be necessary or usual, the law will imply it."

§ 16. The party dealing with a single member of the firm must himself have been acting *bond fide*. No collusive act between him and such member will affect the partnership: for in the words of *Ulpian*, *Alterius circumventio alii non præbet actionem*.

"There is no doubt," said Lord *Mansfield* in *Hope v. Cust*, "but that the act of every single partner in a transaction relating to the part-

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(k) 7. B. & C. 635.

nership binds all the others. But there is no general rule which may not be infected by covin, or such gross negligence as may amount or be equivalent to covin; for covin is defined to be a contrivance between two to defraud or cheat a third."

But the firm may ratify a fraudulent transaction.

§ 17. The admission, acknowledgment, or representation of one partner, *bond fide* and in the course of business, binds the others. Notice to one is notice to all. Payment by or to one, is payment by or to the firm. A receipt or discharge by one is a receipt or discharge by all. These consequences follow from the principle that each partner is *agent* for the rest.

§ 18. The liability of a partner for *future* obligations ceases with his connexion with the firm: provided proper notice of such separation be given. It behoves an ostensible or nominal partner to take care that the fact of the dissolution of the partnership, so far as he is concerned, is made public. If by negligence he permits his late partners to continue the use of his name, he will be bound, notwithstanding the fact of dissolution, to all such creditors as may not know that he has ceased to be interested in the firm; though of course he will not be so, if his late partners wrongfully persist in using his name.

§ 19. Notice in the Gazette is notice to all the world who have not been customers of the firm. A circular letter giving express notice should be sent to each customer; though the question of notice is always one of evidence, and may be inferred from facts, where these precautions have been omitted: as for instance, when a customer calling at the place of business was informed by one of the continuing partners, or a clerk, of the retirement of the party sought to be charged.

§ 20. As a dormant partner's name has never appeared, it cannot of course be removed. On his retirement notice should be given to those who were aware at the time of entering into engagements with the firm, that he was interested. To all others it is unnecessary.

21. Where a partner dies, at law his Executor is not liable for debts contracted by the partnership during the life time of his testator; for the rule *actio personalis moritur cum persona* applies; and the claims and liabilities surviving, the right of action is transferred against the surviving partners. But this exoneration of the estate of a deceased partner might often work the greatest injustice on creditors, as in the case of an insolvency; and therefore *Equity* holds the estate of the deceased partner liable, until all partnership debts contracted during his connexion with the concern have been satisfied.

§ 22. "Whether indeed," writes *Smith*,<sup>(1)</sup> "the claim of the partnership creditors on the separate estate of the deceased shall be postponed to that of his own separate creditors, or whether they shall come in with them *pari passu*, or whether, lastly, they have any claim against it at all, until the insolvency of the partnership estate has been ascertained, are questions which were long unsettled. The last of them, however, is resolved by the case of *Wilkinson v. Henderson*, which decides that the joint creditor is not compelled to pursue the surviving partner in the first instance, but may resort at once to the assets of the deceased, without showing that full satisfaction cannot be obtained from the survivor, and may leave the representatives of the deceased to recover what, if any thing, shall appear upon the partnership account to be due from the survivor to the estate of the deceased partner. It was not, however, decided in that case, that the creditors of the firm could come in *pari passu* with the separate creditors; and the better opinion seems to be that they cannot.

§ 23. "However," he continues, "the liability of a retired partner and that of a deceased partner's estate, will be reduced by the amount of all payments made by his late companions since the dissolution of the partnership, and appropriated, either specifically or impliedly, to the reduction of the demands upon the firm. Thus, *Devaynes* and others were in partnership as bankers, *Clayton* had a running account with the firm, and was in the habit of paying in and drawing out money. At the time of *Devaynes's* death there was a balance of 1713*l.* in favour of *Clayton* and against the firm. After the death of *Devaynes*, his late partners became bankrupt; but, before their bankruptcy, *Clayton* had drawn out sums to more than the amount of 1713 and had paid in

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(1) *Merc. Law*, p. 50.

other sums yet more considerable. Upon the bankruptcy of the surviving partners, *Clayton* was desirous of having recourse to the estate of *Devaynes*; but it was held, that the sums drawn out by *Clayton* since the death must be appropriated to the payment of the balance of 1713*l.* then due; and that, as the total amount of those sums was greater than the balance, the debt due from the firm at the death of *Devaynes* had been discharged and his estate exonerated; the sums paid in by *Clayton* since the death constituting a new debt, for which the survivors only could be held liable."

§ 24. "Although among themselves, partners may, and often do, agree, that, after the dissolution, the credits of the firm shall be received, and its debts paid, by one of the late partners only; yet this arrangement does not affect their joint responsibility to third persons, unless such persons agree to exchange the liability of the firm for that of the single partner. And though it has been held, that neither acceptance of the single partner's note as a collateral security, nor receipt of interest from him on the joint debt, nor changing the heading of the account from the name of the firm to that of the single partner and drawing on him for part of the balance, amounted to conclusive evidence of such an agreement: Yet it seems clear on principle, that, if the creditor be actually a party to the arrangement of the partners among themselves, their acquiescence in that arrangement would be a consideration for his promise to accept the single instead of the double liability, which contributed to induce them so to acquiesce. Besides which, the liability of a single partner may possibly be more beneficial to the creditor than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy; and, therefore, it has been decided, that, if the creditor of a firm, consisting of two persons, expressly agree with them to take, and to take, the separate bill or the sole responsibility of one partner in discharge of the joint debt, his so doing amounts to a discharge of the other partner. Whether such an agreement have been made, is, in each case, a question proper to be submitted to a jury. This sort of arrangement was usual under the civil law, and went by the name of *Novatio*."

§ 25. Novation is thus described in the Institutes.<sup>(m)</sup>

"Also obligations are extinguished by novation; as, for instance, if you stipulate from *Titius* what *Sejus* owes you. For by the intervention of a new person, a new obligation arises, and the former obligation is ex-

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(m) l. 3 tit. 30 s. 30.



tinguished and merged in the second; so far even that the former is extinguished, though the latter be not valid. As, for example, supposing that you stipulate from a ward without the authority of the guardian that which Titius owes you. In such a case the creditor loses his debt, for the former obligation is discharged, and the latter obligation is void. But if the second obligation be contracted by the same person who was bound by the former, there is no novation, unless that second obligation be different from the former one; as, for instance, if a term, or a condition, or a surety be added or be omitted. But the position, that the addition of a condition in the latter obligation causes novation, must be understood thus: If the condition to which the second obligation is subject be accomplished, the novation takes effect, and if it be not, the former obligation continues to exist.

"The ancients held that there was novation where the second obligation was entered into with that intention; and frequent doubts and difficulties arose from that indefinite state of the law, depending on presumption. We have, therefore, enacted by our constitution that there shall in no case be novation, unless with the express intention of the parties, and that wherever that intention is not expressed, the former obligations shall remain in force, together with the latter."<sup>(a)</sup>

§ 26. A retiring partner sometimes continues to draw money from the firm; where he receives a share of the profits, his liability continues; but otherwise, where he stipulates for a fixed annuity independent of the profits.

§ 27. By 19th and 20th Vic. C. 47, partnerships of limited liability have been introduced, and the Indian Legislature has passed a similar enactment.<sup>(c)</sup> This has long been known to the French law as *Société en commandite*.

§ 28. If a sudden dissolution is about to be made in ill-faith, Equity will restrain the partners by injunction; and this is in strict conformity with the Civil law.

"By that law," writes *Story*<sup>(p)</sup> a "partnership, without any express agreement for its continuance, may be dissolved by either party, provided the renunciation be *bonâ fide* and reasonable. *Societas coiri potest vel in perpetuum,*

(a) *Instist. lib. iii. tit. xxx. § 3 Cod. lib. viii. tit. xlii. De Novationibus et Delegationibus, L. ult. Code Civil of France, art. 1273.*

(c) Act 19 of 1857, amended by 7 of 1860.

(p) *Eq. Jur. § 668.*

*id est, dum vivunt, vel ad tempus, vel ex tempore, vel sub conditioe. Dissociamur renunciatione, mortis et pitis minutione, et egestate.* But then it is afterwards added; *Diximus, dissensu solvi societatem; hoc ita est, si omnes dissentiant. Quid ergo si unus renunciet? Cassius scripsit, eum qui renunciaverit societati, a se quidem liberare socios suos, se autem ab illis non liberare. Quod atque observandum est si dolo malo renunciatio facta sit, &c. Si intempestive renunciatur societati, est pro socio actionem.* And again, *Labeo* writes; *Si renunciaverit societati unus ex sociis eo tempore, quo interfuit socii non dirimi societatem, committere eum in pro socio actione.* And again, in a more general form, it is said, *In societate coeunda, nihil attinet de renunciatione cavere; quia ipso jure societatis intempestiva renunciatio in estimationem venit."*

§ 29. Equity will upon a dissolution of partnership restrain one partner from collecting the debts, and will appoint a receiver to get in the partnership estate. But when there is a dissolution, and good faith exists, the survivors *ex necessitate rei* are invested with all authority requisite for them to wind up and settle the partnership affairs. They have a right therefore to receive the partnership debts on the one hand, and to apply the partnership assets in the liquidation of the partnership liabilities, on the other.\*

§ 30. The Court of Chancery exercises a large jurisdiction over partnership affairs through its Bankruptcy jurisdiction, and much space is given in our text-books to this subject. A host of cases also are to be found upon this head. But as we have no Bankrupt Laws to administer in the provinces, I shall not incur these pages with that learning.

§ 31. Partnership agreements often contain clauses by which the partners agree to refer all disputes to arbitration. It becomes a question how far such contracts are binding; for though it is true that *Modus et conventio vincunt legem*, and *quilibet potest renunciare juri pro se introducto*; yet, *jus publicum privatorum pacto non potest mutari*, says *Papinian*; and it is abundantly clear that the public law cannot be ousted by the private agreement of individuals. Thus marriage brocade bonds, contracts in restraint of marriage or trade, maintenance, and champerty, fraudulent preference, and a host of other con-

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\* See *Collett* on Injunction and Receivers for fuller details.

tracts are utterly null and void; and is to be observed, that the maxim confines the power of the party to a *jus pro se* introducto. Thus a man may waive a positive law which is only introduced for the particular benefit of the individual, and the waiver of which militates against no canon of public good or public morality. Thus a man may contract not to avail himself of the statute of limitations, where his debt has been barred by efflux of time; he may waive notice of dishonour of a bill of exchange or promissory note, and the like. But it seems that no man can by his private compact oust the jurisdiction of the ordinary tribunals of the land. Therefore such clauses as we are here commenting on, are effective only where the partners are contented to submit their disputes to arbitration, in accordance with the terms of their deed; but if any one of them declined, he could not be forced to resort to arbitration by his other partners. Equity would not assist them. It would be simply quiescent. It would not decree a specific performance of a stipulation which ousted its own jurisdiction. That was expressly decided in the cases of *Agar v. Macklen*<sup>(q)</sup> and *Earl of Huxburgh v. Bower*.<sup>(r)</sup>

§ 32. The Law appears to have been somewhat uncertain for a while of late years upon this point. In *Linsdale v. Robertson*,<sup>(s)</sup> Lord Chancellor *Sugden*, after reviewing the cases, upheld the decision of Lord *Kenyon* in *Halfhile v. Fenning*, a case much questioned. In the case before Lord Chancellor *Sugden*, two persons interested in the enclosure of the slobbs or mudbanks of Lough Foyle, by deed referred it to arbitrators to make certain arrangements respecting the partition between them of the portion reclaimed from the sea. To a bill filed praying relief respecting matters within scope of the arbitration, the defendant, in his answer, relied on the provisions in the deed of submission, by which, among other things, the parties covenanted not to bring or prosecute any action or suit at law or in equity touching the matters referred, or to do any act to hinder or delay the arbitrators from making their award, and he insisted that the arbitration was still pending. It was ob-

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(q) 2 S. and S. 418.

(r) 7 Beav. 127.

(s) 2 Jones & Lat. p. 58.

jected on the part of the plaintiff, that an agreement to refer to arbitration could not be made a defence against a right to sue. The Lord Chancellor, however, dismissed the bill with costs. He said,

"Upon the whole, therefore, I think *Halfhide v. Fenning* is still law; and the objections to it have probably been occasioned by Lord *Kenyon's* general observations. At all events, I think that an agreement to refer, and arbitrators named, and a covenant not to sue, and a power to make the submission a rule of Court, particularly having regard to the legislative provisions in such a case, do prevent a party from filing a bill with a view, as in this case, to withdraw the case from the arbitrators. It does not appear to me that, because a bill cannot be filed to have arbitrators named or to supply the place of an award, it follows that a bill can be filed before an award, in direct opposition to the plaintiff's own covenants."

Some remarks in the case of *Scott v. Avery* have also somewhat confused the main doctrine. That case will be referred to presently.

In *Morgan v. Milman*<sup>(d)</sup> it was held that where it was agreed that the price should be ascertained by arbitration, the Court could not interfere where the price was not so ascertained.

In *Livingston v. Ralli*<sup>(u)</sup> when there was an agreement to refer "any difference" to arbitrators, *Coleridge, J.* said:

"We should be ousting the Courts of its jurisdiction, if, where a party complains that an agreement is broken, the defendant was allowed to answer, 'You cannot go to the Court, because it is an agreement to refer, and the Court will not enforce such an agreement.' The fallacy seems to be in confounding the distinction between an action for refusing to concur in referring a difference, and an action upon the subject agreed to be referred. Setting up an agreement to refer as a defence is very different in effect from bringing an action upon the subject itself."

In *Scott v. Avery*,<sup>(v)</sup> in the House of Lords, in which case it was provided by the rules of a Marine Insurance Association, of which S. and A. were members, (and which rules were stated to be as binding upon the parties as if inserted in the poli-

(d) 16 Jur. 755, affirmed 17 Jur. 193.

(u) 19 Jur. 594.

(v) 17 Jur. 815, affirmed 20. Jur. 815.

cy), that the sum to be paid to any suffering member by the association for any loss should in the first instance be ascertained by the committee, and if the suffering member agreed to accept such sum in full for his claim, he was then to be entitled to sue for the amount; but in case of difference between him and the committee relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance, then arbitrators were to be appointed, who were to decide upon the claims and matters in difference according to the rules and customs of the association, and in which case the settlement of the committee was to be rescinded and the statement begun de novo. There was a further proviso, that no member, who refused to accept the amount of any loss as settled by the committee, should be entitled to maintain any action at law or suit in equity on his policy until the matters in dispute should have been referred to and decided by arbitrators, and then only for such sum as they should award; and the obtaining such decision was by the rules to be a condition precedent to the right of any member to maintain such action or suit. S. had effected an insurance on his ship with the members of the association, and the ship being lost, an action was brought against A. by S. to recover the amount for which he had subscribed: It was held, (affirming the judgment of the Court of Exchequer Chamber), that the proviso in the rules, that until the amount of any loss was ascertained in the manner prescribed no action at law or suit in equity could be maintained, was legal and binding on the members; and that it was a condition precedent to the bringing of any action or other proceeding that the condition to refer to arbitration should be complied with: and also, that the proviso was not a contract ousting the jurisdiction of the Courts of common law or equity.

In *Scott v. Corporation of Liverpool*<sup>(w)</sup> it was held that stipulations in a contract which would exclude the jurisdiction of a Court are improper, and will not, when improper, fraudulent, or inequitable conduct is alleged, be considered of any importance. This case was affirmed by the Lord Chancellor.<sup>(x)</sup>

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(w) 20 Jur. 111.

(x) 7 W. R. 153.

In *Livingston v. Ralli*, quoted above, *Coleridge*, J. said of *Scott v. Avery*, that it was agreed on all hands by counsel, that an agreement that no action should be brought would not be binding.

The Law in *Lee v. Page*<sup>(y)</sup> is clearly laid down, that an agreement to withdraw any questions which may arise from the ordinary tribunals of the country, is illegal. There the Vice-Chancellor *Kindersley* said,

"Another question connected with the return of the premium was, whether, under the arbitration clause, the plaintiff had a right to sue. His Honor being of opinion that on other grounds he was not entitled to a return of the premium, it was not necessary to decide that question. He (the Vice-Chancellor) had, however, carefully considered the cases, and the learned judges' opinions on the point in the House of Lords, there having been recently a good deal of doubt respecting it, not on the abstract and broad principle, but upon its application. In the case of *Scott v. Avery*<sup>(z)</sup> there were dicta, no doubt, which it was not possible to reconcile with each other; but the general principle laid down was, that it was illegal, by any agreement between the parties, to withdraw the decision of the question at issue from the determination of the ordinary tribunals of the country; but if A. agreed with B. that, in the event of his doing or omitting to do a particular act, A. would pay, not a particular sum of money for damage, but such an amount as an arbitrator to be appointed should agree upon, that was lawful, and was not a withdrawing."

In *Horton v. Sayer*<sup>(a)</sup> it was held that if parties agree that all disputes that may arise between them shall be referred to arbitration, that will not prevent either of them bringing an action against the other. But they may by agreement make it a condition precedent to bringing an action that the amount to be paid shall be settled by arbitration, *Pollock*, C. B. said,

"Were it not for the case of *Scott v. Avery* (5 H. L. C. 811) there would have been no question here at all. That case decided that where a sort of condition precedent to bringing an action is created, a remedy in the Courts at Westminster cannot be resorted to until the condition is fulfilled: but the present case is exceedingly different from that. We

(y) 7 Jur. n. s. 768.

(z) 5 H. L. C. 811; 2 Jur. n. s. 815.

(a) 5 Jur. n. s. 989.

all know sufficient to say, that long before *Scott v. Avery*, it was decided in a great number of cases, extending over some hundreds of years, that the Courts of law cannot be ousted of their jurisdiction by the mere agreements of parties—viz. a mere agreement to refer matters in dispute, should such arise, will not prevent either of the parties from resorting to a court of law to enforce his rights or obtain a remedy for his wrongs.”

§ 33. But if such an agreement has been acted upon, it does not lie in the mouth of either party to set aside the award, on the ground that the agreement to refer was illegal.

So in *Cleworth v. Pickford*,<sup>(b)</sup> Lord Abinger said,

“With respect to the last point made by Mr. *Miller*, it appears to be entirely a misapplication of the well known rule of law, that an agreement to refer is not binding. It is true that such an agreement is not binding unless it is acted upon, but when the reference has taken place, and the award is made, it becomes so. In one sense it does not oust the Court of its jurisdiction, but in another sense it does ; for when the award is made, the jurisdiction of the Courts is gone ; and all the Courts have to say is, whether it is a good award or not.”

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(b) 7. M. and W. 314.

## TOPIC THE TWENTY-FIFTH.

### BAILMENT.

*"In fiduciis, mandatis, conductis locatis, magni est judicis statuere quid quemque cuique preestare oportet."*—CICERO.

§ 1. The Law of Bailment requires really little more than a study of the great case of Coggs v. Bernard,<sup>(a)</sup> in which Lord Holt delivered one of the most comprehensive, luminous judgments on record; in the course of which he expands the subject, quoting largely from Bracton passages which are curious, as showing how very largely and closely the English Common Law copied from the Roman Civil Law: for they are mere transcripts from Justinian.<sup>(b)</sup>

§ 2. The result of this famous decision shows us that Bailments are divisible into six distinct classes.

1. *Depositum*; or a naked bailment of goods, to be kept for the use of the bailor.

2. *Commodatum*. Where goods or chattels that are useful, are lent to the bailee *gratis*, to be used by him.

3. *Locatio rei*. Where goods are lent to the bailee, to be used by him for hire.

4. *Vadium*. Pawn.

5. *Locatio operis faciendi*. Where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.

6. *Mandatum*. A delivery of goods to somebody, who is to carry them, or do something about them *gratis*.

§ 3. The chief point for consideration is that of the principles on which the Bailee in each particular class of Bailments is responsible for the safety of the thing committed to his

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(a) Lord Raymond 909 1: Sm. L. C.

(b) Lib. 3 tit. 15.



charge: and taking this as the principle of division, it will be seen that Bailors and Bailees are divisible into *three* classes.

"The first of these," writes *Smith* (c) "is, where the bailment is for the benefit of the bailor alone: this includes the cases of *mandataries* and *deposits*, and in this the bailee is liable only for gross negligence. The second is, where the bailment is for the benefit of the bailee alone; this comprises loans, and in this class the bailee is bound to the very strictest diligence. The third is, where the bailment is for the benefit both of bailor and bailee; this includes *locatio rei*, *vadium*, and *locatio operis*, and in this class an ordinary and average degree of diligence is sufficient to protect the bailie."

§ 4. 1. As to *Depositum*. Here the bailee takes no interest and receives no reward. It would not be reasonable therefore to expect from him as high a degree of care as if he received reward; and accordingly Lord *Holt* lays it down, that if the bailee be guilty of *gross* negligence, he will be chargeable: but not for any *ordinary* neglect. *A fortiori*, he will not be chargeable, where the property is stolen from him; and *Bracton* says,

"*Is apud quem res deponitur, re obligatur, et de eâ re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re depositâ dolo commiserit; culpâ autem nomine non tenetur, scilicet desidîæ vel negligentîæ, quia qui negligentî amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.*"

§ 5. The case of *Doorman v. Jenkins*,<sup>(d)</sup> has somewhat qualified Lord *Holt's* broad dictum, for it was there decided that a man may keep his own goods with gross neglect, and that if so, it would be no excuse to him to say that he kept the *Depositum* with as much care as he kept his own. He is bound not to be negligent with regard to another's property, whatever he may choose to be with respect to his own.

§ 6. The bailee of a *Depositum* may not make use of it.

§ 7. 2. As to *Commodatum*, or Lending *gratis*; Here, though the Bailee receives no reward, he has an interest in the thing; for it is lent *for his use*. The Law therefore increases

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(c) 1 L. C. 104.

(d) 2 A. and E. 256

the proportion of care he is called upon to bestow; he may be amenable for *slight negligence*. On this point the words of Lord Holt and Bracton must be studied. "As to the second sort of Bailment, viz., *Commodatum*, or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable: as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, *ubi supra*: his words are, "*Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio aut latronum vel hostium incursu, consumpta fuerit, vel deperdita subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alias eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur.*"

§ 8. The condition on which the loan is made must not be deviated from. Thus if I lend a man my horse to ride, he must not allow his servants to ride it. This is discussed in the *Doctor and Student*; and it is there laid down, "that, if a man lend another a horse, which loan is properly called a *Commodatum*, if the horse perish by any accident which could not reasonably be foreseen and provided against, the lender must bear the loss; but, if the casualty occur through the

carelessness of the borrower, he must answer for his negligence. And it is added, a man may have of another, by way of loan, money, corn, wine; and such other things which cannot be specifically re-delivered, if the borrower makes use of them, but their value must be restored. And, as such things may be used by the borrower as his own, if they perish, it is at his jeopardy: but such borrowed articles as are to be re-delivered, the borrower must not use or occupy, except in such manner as they were borrowed for: and if, in that occupation they perish, without his default, he will not be responsible; though, if such things be occupied otherwise than according to the intent of the loan, and in such occupation they perish, in what wise so ever they perish, he that borrowed them shall be charged therewith in law and conscience. Also if a man have goods to keep, under a general bailment, whether he have or have not any recompense for the keeping, he shall stand charged or not charged for their loss, as default or no default shall be in him: but, if he be a bailee for hire, and, at the time of the delivery, expressly promise to re-deliver the goods safe, then he shall be charged with all chances that may fall: though, even if he make that promise, but is to have nothing for the keeping, he is bound to answer for on casualties except such as arise in consequence of his own wilful default; for, upon a *nudum pactum*, or naked promise, no action lieth."

§ 9. "3. *Locatio rei*, Lending for hire. Here, says Lord Holt, the Bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again, he says, I must recur to my old author, *Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si praestiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.* From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a

family uses ; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen ;" and therefore where a bailee prescribed for the horse lent him, instead of calling in a Veterinary Surgeon, he was held liable for its loss.(e)

§ 10. 4. *Vadium* or Pawn. Here the bailment is merely a security for money lent by the Pawnee ; and ordinary care is required ; and if the bailment is nevertheless lost, the Pawnee may still resort to the Pawnor for repayment of the loan, for the pledge is but *collateral* security for the debt.

§ 11. The Pawnee may use the article pledged or not, according to circumstances. On this point Lord Holt says :

"If the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c., but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them : but then she must do it at her peril ; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and jewels taken from thence, she would be excused ; if she wears them abroad, and is there robbed of them she will be answerable. And the reason is, because the pawn is in the nature of a deposit and, as such, is not liable to be used. And to this effect is O. W. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompence for the meat. As to the second point, Bracton, 99, gives you the answer :— "*Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur ; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit, nec impediatur creditum petere.*"

§ 12. On default made, the Pawnee may sell the pledge, and herein a *pledge* differs from a *Lien*. The balance after pay-

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(e) *Leane v. Kint*, 3. Cam. 4.

ment of debt, interest, and charges, belongs to the Pawnor. Herein also it differs from a mortgage : for there, on default, the property vests absolutely in the mortgagee ; but a default in redeeming a pledge, does not increase the Pawnee's estate in the chattel ; his is still only a *special* interest.

§ 13. *Locatio operis faciendi*, or goods delivered to have some work performed upon them : such as cloth to be made into a coat. Whatever that *opus* may be, whether of *opus faciendi*, an *opus custodiæ*, or *mercium vehendarum*, a parcel to be carried, a watch to be repaired, and the like. Here the Bailee receives a pecuniary reward for his work, and is bound to use ordinary diligence for the preservation of the article, as well as to perform the work contracted for.

§ 14. If an unexpected risk arises, the Bailee's efforts to save the article must be proportionate, as in the case of fire or flood.

§ 15. But he is not liable for mere accident, not the result of his own negligence. The language of *Ulpian* deserves to be quoted.

"*Contractus quidam dolum malum duntaxat recipiunt quidam dolum et culpam dolum tantum, depositum et precarium. Dolum et culpam, mandatum commodatum venditum, pignori acceptum, locatum, item dotis datio, tutelae, negotia gesta in his quidem et diligentiam. Societas et rerum communiset dolum et culpam recepit sed haec ita se nisi quid nominatim convenit—legem enim contractus dedit, excepto eo quod Celsus putat non valere convenerit ne dolum praestetur hoc enim bonae fidei iudicio contrarium est ut ; ita utimur, animalium vero casus, mortes que sine culpa accidunt, fugæ servorum qui custodiri non solent, rapinae, tumultus, incendia, aquarum magnitudines, impetus praedonum, a nullo praestantur.*"

Hence it appears that in all contracts, *dolum malus*, which implies *intention*, makes the person responsible. In some contracts *culpa*, or negligence, that which might have been avoided, but for the party's own fault, want of care, or foresight, has the same effect. *Casus fortuitus*, unavoidable accident<sup>(f)</sup> never

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(f) See *Causus fortuitus* explained by *Vinnius* "*Casus fortuiti varii sunt, veluti avi ventorum, turbinum, pluviarum, grandinum, fulminum, aestus, frigoris, et simi-*

makes the bailee liable ; *except in two cases* about to be mentioned.

§ 16. It is very important therefore to know what neglect is. Sir *William Jones* in his work on *Bailments* divides it into three kinds, ordinary, gross, and slight. Ordinary neglect he says,

“Is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns. Gross neglect (*crassa negligentia, negligentia dissoluta*) is the want of that care, which every man of common sense, how inattentive soever, takes of his own property. Slight neglect is the omission of that diligence, which very circumspect and thoughtful persons use in securing their own goods and chattels.”

§ 17. Lord *Stowell* gives in the case of the *Radenburgh* the following instance of gross negligence, which he calls *negligentia malitiosa*.

“If I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss though his pockets were picked in the way. But if instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property, so as to invite the snatch of any person he might meet in the crowded population of this town he would be liable, because he would be guilty of the ‘*negligentia malitiosa*’ in doing that, from which, the law must infer, he intended that which has actually taken place.”

But perhaps we shall escape much metaphysical difficulty, if we regard negligence as a fact in each case depending upon its special circumstances. No doubt different classes of Bailees

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*lium calamitatum, quæ cœlitus inmittuntur. Nostri vim divinum dixerunt ; Græci, Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinæ ædium fundorum chasmata, incursus hostium prædonum impetus, &c., fugæ servorum, qui custodiri non-solent. His adde damna omnia a privatis illata, quæ quominus inferrentur, nulla cura caveri potuit. Ad casus autem fortuitos non sunt referendi illi-cus, qui cum culpa conjuncti esse solent ; cujusmodi sunt furta, Quamobrem, quireit furto amissam vel incendio, verbi causa servorum negligentia orto consumptam dici-is diligentiam suam probare debet. Quod vero incendium inalieniscilibus obortum occupat cedes vicinar, aut quod fulmine excitatur, aut a grassatoribus vel incendiariis emmittitur, id inter casus fortuitos numerari debet.”*

(g) 6. Rob. Ad. Rep.

are bound to exercise different degrees of care ; but each is answerable for that degree of legal negligence which affects his particular case. This it must be for the judge to determine on the facts proved before him. In *Wilson v. Brett*.<sup>(h)</sup> Rolf, B. said

"I can see no difference between negligence and gross negligence—it is the same thing, with the addition of a vituperative epithet."

§ 18. The remarks of *Aristotle* are so much to the point, that I shall quote them.

"When, therefore, the hurt takes place contrary to expectation, it is an accident, when not contrary to expectation, but without wicked intent, it is a mistake ; for a man makes a mistake when the principle of causation is in himself ; but when it is external, he is unfortunate. But when he does it knowingly, but without previous deliberation, it is an unjust act, as all those things which are done through anger, and the other passions, which are necessary or natural ; for by such hurts and such mistakes they act unjustly, and the actions are unjust ; still the doers are not yet on this account unjust or wicked ; for the hurt did not arise from depravity. But when any one acts from deliberate preference, he is then unjust and wicked."<sup>(i)</sup>

§ 19. These observations will guide the Judge as to the principles upon which, and to what degree, a man is to be held responsible for his own acts or negligence.

§ 20. The two excepted cases in which the liability of the Bailee is extended beyond the ordinary limits, are those of an *Inn-keeper* and a *Common Carrier* of goods.

§ 21. The leading case on the liability of an Inn-keeper is *Calve's Case*,<sup>(j)</sup> where the words of the writ show what is the common law extent of an Inn-keeper's liability. They are

*"Cum secundum legem et consuetudinem regni nostri, Angliæ hospitatores*

(h) 11. M. & W. 115.

(i) *Note.* Here we see the *ατυχία*, *αμαρτημα*, and *αδικημα*. But truly the decision is fourfold.

1. *οταν παραλογως η βλαβη γενηται*—*casus*—accident.
2. *οταν μη παραλογως, ανεν δε κακίας*—*culpa*—negligence.
3. *οταν ειδως μεν, μη προβουλευσας δε*—*dolus in dictus*—constructive fraud.
4. *οταν εκ προαιρεσεως*—*dolus directus*—direct fraud.

And see *Aristotle's Rhetoric* l. 1 c. xiii.

(j) 8 *Coke* 32. S. C. 1 Sm. L C 87.

*qui hospitia continent ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipsius A. precu infra hospitium ejusdem B. &c., inventum, pro defectu ipsius B. ceperunt, &c.*

§ 22. The legal definition of an inn is "a house where the traveller is furnished with every thing he has occasion for while on his way." So that in the Mofussil, where the custom is for parties to put up at charitable choultries and the like, finding their own provisions, I apprehend the rule will not apply. But at Bangalore, the Neilgherries, the Shervaroys &c, inns are established; and in sundry bungalows are to be found a class of Butlers who provide the traveller. The progress of society will no doubt increase the number of inns in the country, as the facilities for locomotion are increased, and therefore it is not out of place to dwell on this topic of Law.

§ 23. A guest may by his own negligence remove the common law liability of the inn-keeper. Thus in *Burgess v. Clements*(\*) Lord *Ellenborough* said :

"The cases show that the rule is not so inveterate against the inn-keeper, but that the guest may exonerate him by his fault, as if the goods are carried away by the guest's servant, or the companion whom he brings with him, for so it is laid down in *Calve's* case. Now, what is the conduct of the plaintiff in this case? The inn-keeper not being bound to find him more than lodging, and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose of exposing in it his wares to view, and introducing a number of persons, over whom the inn-keeper can have no check or controul, and thus for a purpose wholly alien from the ordinary purpose of an inn, which is *ad hospitandos homines*. Therefore, the care of these goods hardly falls within the limits of the defendant's duty as inn-keeper. Besides, after the circumstances relating to the stranger took place, which might well have awakened the plaintiff's suspicion, it became his duty, in whatever room he might be, to use, at least, ordinary diligence; and particularly so, as he was occupying the chamber for a special purpose :

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(\*) 4 M. & S. 306.



for though, in general, a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care. It seems to me that the room was not merely entrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to exercise ordinary care in the safe keeping of his goods, and it is owing to his neglect, and not to the fault of the inn-keeper, that the accident happened; and this was a question proper to leave to the Jury."

§ 24. What amounts to such a degree of negligence, is illustrated by the two following cases.

In *Armistead v. Wilde*<sup>(l)</sup> where a guest showed his money ostentatiously in the presence of several persons, and then put it in an ill-secured box which he left in the travellers room, from whence it was stolen, the inn-keeper was held not liable. But in *Cachill v. Wright*,<sup>(m)</sup> where the guest showed his money openly in the commercial room, went to bed, and slept with his bed room door open, so that a person outside could see his watch and money on the table: and when late at night a servant of the Inn-keeper, whose duty it was to sit up all night and attend to the outer door of the inn, let in a stranger, who two hours after secretly left the inn, having stolen the watch and money, the degree of negligence by the guest, the law as to which would constitute a defence for the inn-keeper, was thus laid down by *Erle, J.*

"We think that the rule of law resulting from all the authorities is, that in a case like the present the goods remain under the charge of the inn-keeper and the protection of the inn, so as to make the inn-keeper liable as for a breach of duty, unless the negligence of the guest occasions the loss, in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances."

§ 25. The liability of a lodging house-keeper stands upon the same policy. In the case of *Dancey v. Richardson*<sup>(n)</sup> there was a difference of opinion as to the responsibility of the master for the act of the servant; but the principle that

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(l) 17 Q. B. R. 261.

(m) 20 Jur. 1072.

(n) 18 Jur. 721.

a boarding-house keeper is bound to take as much care of his guest's goods as a prudent house-holder would take of her own was recognized by the whole Court. In that case, "The Declaration alleged that Plaintiff became a guest in the boarding-house of Defendant, on the terms, amongst others, that Defendant would take due and reasonable care of the goods of Plaintiff whilst they were in the house of Defendant, for hire and reward to Defendant in that behalf, and that it then became the duty of Defendant, by herself and her servants, to take such due and reasonable care of the goods of Plaintiff whilst she remained as a guest, with the goods, in Defendant's house. It appeared that Plaintiff was a guest in Defendant's boarding-house, paying between 2*l.* and 3*l.* per week, and having the use of sitting, drawing, and dining rooms in common with others, her own bed-room, her board, and the attendance of the servants. On the 10th December, in the evening, Plaintiff, being about to leave, while her luggage was in the hall near the front door, sent one of the Servants out to a shop near for biscuits; he left the front door ajar, and a thief entered and stole a box of Plaintiff's. The Judge directed the Jury that Defendant was not bound to take more care of her house and the things in it than a prudent owner would take; and one of the questions which he left to the Jury was, whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of Defendant in hiring or keeping the servant. It was held by the Court, that it was at least the duty of a boarding-house keeper to take such care of her house and the goods of her guests in it as a prudent house-holder would take. And, by Lord *Campbell*, C. J., and *Coleridge*, J., that it was a breach of Defendant's duty as keeper of a boarding-house if through the gross negligence of Defendant or her servant the Plaintiff's box was stolen; and that the distinction between the negligence of the servant in leaving the door open, and the negligence of Defendant in hiring or keeping the servant, could not be supported; and therefore that the direction was wrong. But by *Wightman* and *Erle*, JJ., a boarding-house keeper is not

bound to take more care about the goods of his guest than he as a prudent owner would take with respect to his own ; and that if Defendant had taken care to employ and keep none but trustworthy servants, she was not liable for the act of negligence on the part of the servant in leaving the door open ; and therefore that the direction was right."

§ 26. The liability of carriers is also a matter of growing importance in this country : what with roads, canals, railroads, and the increasing traffic by sea from foreign countries, and the trade from port to port, along the coast. So that all Judges, and especially those whose districts have a seaboard, are liable to have cases in which the liability of carriers will have to be considered on principle.

§ 27. A carrier, may be 1st, a mere gratuitous Bailee, as where a friend undertakes to carry a parcel, *mandatum* ; and as we have seen, such a Bailee is only liable for *gross*<sup>(o)</sup> negligence : or he may be 2ndly a Bailee for hire, though not a *common carrier*, as when a cab-man undertook to carry a parcel<sup>(p)</sup>, or he may be 3rd a *common carrier* ; such as the proprietor of wag-gons, barges, lighters, merchant ships &c. ; or 4th he may belong to a class of carriers whose liabilities are regulated by Statute Law.

§ 28. It is important to observe that only carriers of *goods* are *common carriers*. This was so held in *Benett v. P. & O. Steam Boat Co.*<sup>(q)</sup> for there is a difference between the contract to carry *goods* and passengers. The common carrier is an *insurer* of goods ; he is only liable for damages to passengers on the score of *negligence*. So in *Crofts v. Waterhouse*<sup>(r)</sup> Parke J. said,

"There is a wide distinction between contracts for the conveyance of

(o) In the case of *Cachill v. Wright* above quoted Lord Campbell C. J. defined *gross negligence* thus ; "Gross negligence is want of ordinary care : slight negligence is want of extraordinary care."

(p) *Willoughby v. Horridge*, 12. C. B. 742.

(q) 18 p. T. 1. P. 85.

(r) 11 Moore 188.

passengers, and those for the conveyance of goods. In the latter the parties are liable at all events, except the goods are destroyed or damaged by the act of God or the King's enemies; whilst in the former they are only responsible to their passengers in cases of express negligence."

§ 29. This distinction is well illustrated by the case of *Grote v. Holyhead Ry. Compy* :<sup>(a)</sup> There the action was for injuries sustained by the plaintiff owing to the breaking down of a bridge as the train passed over it; and *Williams, J.* told the jury that the question was, "whether the bridge was constructed and maintained with sufficient care and skill, and of reasonably proper strength, with regard to the purposes for which it was made; and that if they should think not, and that the accident was attributable to any such deficiency, the plaintiff would be entitled to recover." It appeared that an eminent engineer had constructed the works. The Court upheld the direction of the Judge on his statement that he had also directed the attention of the jury to the proposition that,

"If a party in the same situation as that in which the defendants are, employ a person who is fully competent to the work; and the best method is adopted, and the best materials are used, such party is not liable for the accident; although it could not be contended that they were not responsible for the accident merely on the ground that they employed a competent person to construct the bridge."

Yet in this case, if *goods* had been smashed by the fall, the Company would have been liable.

§ 30. Where there is a duty to carry passengers, the Law implies a duty to carry *safely*. Thus in *Collett v. London and N. W. Ry. Co.*<sup>(b)</sup> the defendants were under a statutory obligation to carry the Postmaster General's mail-bags and the officers in charge of them. The Plaintiff, as one of such officers in the train, was injured by a collision with another train; and it was contended for the Defendants, that the contract to carry safely and securely, if it existed, was with the Postmaster General, and not with the Plaintiff. But Lord *Campbell, C. J.* said :

"The allegation in the declaration that it was the duty of the defen-

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(a) 2 Ex. 251.

(b) 20 L. J. Q. B. 411.

dants 'to use due and proper care and skill in and about the carrying and conveying of the plaintiff' is made out in point of law. That duty does not arise from any contract with the plaintiff, but from the obligation imposed by the Legislature upon the Company to carry the mail-bags, and the officers of the Post-office in charge of the letters ; and if it be the duty of the Company to carry the plaintiff at all, it must be their duty, in doing so, to use reasonable care and skill. It cannot be said that it is enough for the Company to bring the dead body to the end of the journey."

§ 31. As to the liability for carriage of live stock, a carrier in the absence of any special agreement, incurs the same liability and duty, and will be to the same extent responsible for negligence, as in the case of ordinary goods. In *Thearl v. Bracky* <sup>(u)</sup> a carrier was held liable for the loss of a dog which had been delivered to him with a string round its neck, and which he had placed in a box, from which the dog escaped *in transitu*. But now, since the introduction of railways, the carriage of live animals is usually the subject of special contract ; the Railway Companies issuing tickets to preserve themselves against liability except in certain specified cases. In *Carr v. The Lancashire and Yorkshire Railway Cy.* <sup>(v)</sup> Parke, C. J. drew a distinction between the liability of carriers of live stock and goods ; though the case did not turn upon that, and though the point has not been decided, the weight of his observation has been recognized in *McManns v. The Lancashire and Yorkshire Railway Cy.* <sup>(w)</sup>

§ 32. Carriers are bound to receive such goods as they profess to carry, and for a reasonable price. If they ask an unreasonable price, a reasonable price may be tendered. But the carrier is entitled to payment at the time of delivery, and it is from his being bound, like the inn-keeper, to receive, that his right of lien arises.

§ 33. The carrier is bound by his common law duty to carry safely. Therefore he must provide sound stout carriages or ships. So in *Lions v. Mills*, <sup>(x)</sup>

Where a carrier had stipulated that he "would not be ap-

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(u) 2 Stark. 323. (v) 7 Ex. 707. (w) 4 Jur. n. s. 1441. (x) 5 East p. 423.

swerable for any damage unless caused by want of ordinary care or diligence on the part of the master or crew ; and that in such case he would only be liable to the amount of ten per cent on the actual damage ;" and the owner signed a notice to that effect ; the goods were damaged by the leakage of the defendant's vessel, and it was found that when the goods were shipped the vessel was not in a proper condition to convey them safely, and that the loss was caused by the defendant's negligence. The question was, whether the plaintiff with reference to the agreement, was entitled to more than ten per cent, on the damage. The Court held, that the plaintiff was entitled to the full amount ; and Lord *Ellenborough* stated that "every carrier *impliedly* undertakes that his carriage is tight and fit for the purpose of employment for which he holds it forth to the public ; it is the very foundation and substratum of the contract that it is so."

"It is impossible" he said, "without outraging common sense, so to construe this notice, as to make the owners of vessels say, we will be answerable to the amount of ten per cent. for any loss occasioned by the want of care of the master or crew, but we will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious ; for this would in effect be saying, we will be at liberty to receive your goods on board a vessel, however leaky, however unfit and incapable of carrying them ; we will not be bound even to provide a crew equal to the navigation of her ; and if, through these defaults on our part, she is lost we will pay nothing. .... Ridiculous as this supposed state of the agreement must be, yet these and more absurd stipulations must be introduced into it if we give it a construction which shall bring this case within it..... Every agreement must be construed with reference to the subject-matter ; and, looking at the parties to this agreement (for so I denominate the notice) and the situation in which they stood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters was to limit their responsibility in those cases only where the owner would have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to guard against."

§ 34. It is to be observed that in that case the carrier had stipulated that he would not be liable : and the reason-

ing of Lord *Ellenborough* seems conclusive, that where a special contract is agreed to between the parties, it should still be read by the duty implied by law. But the later decisions have gradually departed from what seems a sound rule of public policy, and have held in unisance with the Roman Law. Its language is "*Si quid nominatim convenit; vel plus vel minus in singulis contractibus, hoc servabitur, quod initio convenit; legem enim contractus dedit.*" Accordingly the Courts have latterly construed these special stipulations in favour of the carrier. It may be said that the Plaintiff has assented to the terms of the special contract, and knew what risk he ran: and that the risks now run by the Railway Companies, especially in reference to live stock (so liable to be terrified by the noise) are so increased, that they require protection; yet on the other hand it must be confessed, that the great power of the Railway Companies, and the necessity which the Public is under to send their goods and live stock by such conveyance, leave little option, as to accepting or refusing the terms which the Railway Companies insist upon. The only safeguard here would seem to be in a close scrutiny of what are *reasonable* terms; but it must be admitted that the late decisions have gone far to weaken that safeguard. Thus in *Chippendale v. Lancash. & Y. Ry. Co.*<sup>(1)</sup>, where the Plaintiff signed an agreement, by which he undertook "all risk of conveyance whatever;" and it was stated that the Company would *not* be responsible for any damage to live stock, *however* caused: the jury found that injury was caused to the Plaintiff's cattle by the truck having been so defectively constructed as to be unfit and unsafe for the purpose of conveying cattle; and there was no evidence that the Plaintiff knew of the defect, or that he had examined or been required to examine the truck. But the Court held that the terms of the special contract precluded the Plaintiff from recovering. In the *G. N. Ry. Co. v. Morville*<sup>(2)</sup> this was confirmed. So in *McManus v. the Lancashire and Yorkshire Railway Company*, above quoted, the terms of the notice were held reasonable, and to protect the Defendants against the consequences of all defects in the truck. The authority of that case has however

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(1) 15. Jur. 1106.

(2) 21. L. J. Q. B.

been much shaken in *Beal v. South Devon. Ry. Co.*<sup>(a)</sup> *Bramwell*, B. said

“ We are bound by the decision in the case of *McManus v. The Yorkshire and Lancashire Railway Company*, to hold that according to the true construction of the 17 & 18 Vict. c. 31, a special contract with a railway company, no matter how deliberately it may have been entered into, how long it may have been in existence, or to what extent it may have been acted upon, may be rescinded by a tribunal incompetent to deal with the question. Whenever this question comes before a Court of Error I shall be prepared with the reasons which make me doubt whether the words and intent of the statute have been adhered to, and whether the construction placed upon them by the Court of Exchequer Chamber does not offer a temptation to fraud, by enabling a person to repudiate a deliberate agreement. Suppose the Railway Company had said, it is not worth our while to carry fish, receiving the statutory rates, and that the sender had agreed that if they would carry them he should take the risk upon himself ; or that the sender had agreed that in consideration of their carrying the fish at a lower rate he should not hold them responsible as common carriers ; why should it not be held a valid contract ? However, sitting here, we are bound by the authority of *McManus v. Yorkshire and Lancashire Railway Company*.”

In that case the sender of fish by railway signed a contract, containing the following condition:—“ Neither of the said Companies shall be responsible under any circumstances for loss of market or other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud.” It was held, that the condition was not unjust or unreasonable under the Railway and Canal Traffic Act, 1854, and that it protected the Company against being answerable for loss of market, consequent upon a delay of a train for three hours beyond the accustomed time of arrival, such delay not being occasioned by gross neglect.

The case of *Harrison v. London, Brighton and S. Coast Co.*<sup>(b)</sup> may be quoted on this point of reasonableness. There the Plaintiff, a passenger by the Defendants' railway from L. to B.,

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(a) 8. W. R. 651.

(b) 6 Jur. n. s. 954.



took with him two horses and a retriever dog; the horses were put into a horse-box, and a servant of the Defendants proposed that the dog should be placed in the horse-box, to which the Plaintiff assented. The dog was fastened in the horse-box by means of a leather collar round its neck, and a strap thereto, which passed through a ring fixed to the side of the horse-box; the collar and strap were furnished by the Plaintiff, and were his property. The Plaintiff's servant signed a ticket, subject to the following conditions:—"The Company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given to them. The Company will in no case be liable for injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*l.* 10*s.* per cent., or 6*d.* in the pound, whatever distance the horse or other animal is to be carried." No declaration of the value of the dog was made, and the plaintiff paid 3*s.* for the carriage of it. On the arrival of the train at W. a window in the horse-box was found open, and the dog had escaped through it. The Court having power to draw inferences of fact.

*Cockburn*, C. J., and *Blackburn*, J., held, that the dog was lost by casualty, and without negligence in the Plaintiff or the Defendants; that a dog is one of the animals to which the proviso in sect. 7 of the Railway and Canal Traffic Act, 1854, (17 & 18 Vict. c. 31), relates; that the condition in the ticket was not just and reasonable within that section, in two respects—first, that the meaning of the ticket was, that if the value of the dog exceeded 5*l.* its value should be declared, and then the Company would not be liable in any event, unless the extra charge of 2*l.* 10*s.* per cent. was paid; secondly, that it was incumbent on the Company to show that the condition was just and reasonable, and that, in the absence of evidence by the Company, 2*l.* 10*s.* per cent. insurance for all distances

was an excessive charge ; and that, the condition being void the Company were liable as common carriers for the full value, of the dog.

And in *Carr v. Lancashire G. Ry. Co.*<sup>(c)</sup> where the declaration charged the Defendants, as common carriers, with an undertaking to carry the Plaintiff's horse, subject to a condition that the Plaintiff should undertake "all risks of conveyance whatsoever;" and that the Defendants should "not be responsible for an injury or damage, *however* caused," during the transit, the jury found the declaration proved, and that by the gross negligence of the Defendants, the horse-box was propelled against a truck, and the horse killed. The carriers were held in the Exchequer, on the terms of the contract, to be wholly exempt from liability even for their gross negligence. *Parke, B.* said :

"The jury have found that the defendants have been guilty of gross negligence, and therefore it may be taken upon this record, that the breach, if any, was so occasioned. Now, I am of opinion that, by entering into this contract with reference to the subject-matter, the owner has taken upon himself all risk of conveyance, and that the Railway Company are bound merely to find carriages and propelling power. The contract appears to me to amount to this : the Company say they will not be responsible for any injury or damage, however caused, occurring to live stock, of any description, travelling upon their Railway. This, then, is a contract by virtue of which the plaintiff is the party to stand all risk of accident and injury of conveyance.....It is not for us to fritter away the true sense and meaning of these contracts merely with a view to make men careful. If any inconvenience should arise from their being entered into, that is not a matter for our interference ; but it must be left to the Legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability. We are bound to construe the words used, according to their proper meaning ; and according to the true meaning and intention of the parties, as here expressed, I am of opinion that the defendants are not liable."

The Plaintiff had a verdict for the full amount. This case may be held to be the climax of the new doctrine which has gradually superseded that of *Lyons v. Mills*.

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(c) 7. Ex. 707.

§ 35. Common carriers are carriers by land or water. A land carrier exercising his ordinary calling is regarded as an insurer, so that in event of the goods entrusted to him being lost or damaged, nothing, to use the words of Sir *W. Jones*,<sup>(d)</sup> will excuse him except the act of God or the King's enemies; the act of God being understood to signify inevitable accident; and by the King's enemies, being meant public enemies with whom the nation is at open war. Such for instance would be the loss of goods plundered *in transitu* by the mutineers or rebels.

§ 36. When however, writes Mr. *Smith*,<sup>(e)</sup> the increase of personal property throughout the kingdom, and the frequency with which articles of great value and small bulk were transmitted from one place to another, had begun to render this degree of liability intolerably dangerous, carriers, on their part, began to insist that their employers should, in such cases, either diminish it by entering into special contracts to that effect upon depositing their goods for conveyance, or should pay a rate of remuneration proportionable to the risk undertaken. To this end, they posted up and distributed written or printed notices, to the effect that they would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. If this notice was not communicated to the employer, it was of course ineffectual. *Kerr v. Willan*;<sup>(f)</sup> but if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by its contents.

§ 37. Very many questions having been raised on the effect of these notices, the Legislature passed the Statute 11 Geo. 4th and 1 Wm. 4 C. 68, known as the Land Carriers, Act, limiting their liability as to articles of particular description above the value of £10, unless the value and nature of the article was declared at the time of delivery. This act does not

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(d) Bail 104.

(e) 1 L. C. p. 175.

(f) 6 M. & S. 150 As to a bye law not communicated, *Great Western Railway Company v. Goodman*, 12 C. B. 313.

however extend to this country. But the Xth Section of Act XVIII of 1854, (the Act for regulating Indian Railways,) is the same.

§ 38. Owners of Ships are common carriers : it has been contended that common carriers are those only who carry within the realm : but *Benett v. P. & O. Cy.*<sup>(g)</sup> and *Crouch v. London & N. W. Ry.*<sup>(h)</sup> have settled that extra-territorial carriers are common carriers, but their liability is limited by the terms of the bill of lading, which always contains a clause against losses "by the king's enemies, fire, and all and every other damages and accidents of seas, rivers, navigation of what kind soever." They are protected in the same way as land carriers by 26 Geo. 3rd. C. 86. from making good loss on articles of value, unless declared ; and by 17 & 18. Vic. C. 104. S. 388, they are not liable for loss occasioned by fault of pilot.

§ 39. It is of course impossible, within the scope of such a work as this, to enter upon the discussion of the duties of owners and masters of ships : such learning must be looked for in the text books of Abbot and other writers. A few general observations must here suffice.

§ 40. By the expression "*Act of God*" is understood some natural inevitable accident—*vis major*—such as lightning, earthquake, tempest ; not accidents arising from the negligence of man.

§ 41. *Enemies*—The term is used in contradistinction to pirates, rovers, thieves ; and applies to acts done by persons *jure belli*.

§ 42. *Fire*—How occasioned is immaterial, whether by a common accident, or lightning, or an act done in duty to the State. But, if goods be put on board in a damaged condition, and are, in consequence, liable to effervesce, and generate the fire by which they are consumed, the underwriters are not liable.

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(g) 6 C. B. 775.

(h) 23. L. J. C. P. 78.

§ 43. *Perils of the Sea*.—These words mean, losses occasioned strictly by sea damage, by stress of weather and waves, lightning and tempest, rocks, sands, &c. A loss occasioned by the ship insured being run down, is one by perils of the sea; so is a loss by her striking the ground, under the influence of a swell, on the uneven bed of a dry harbour, or a loss of animals killed by the agitation of the ship in a storm. If a vessel be not heard of within a reasonable time after her sailing, it is presumed that she has foundered, and the assured may recover for a loss by perils of the sea. But if the ship be worm-eaten or rat-eaten, or hove down on the beach within the tideway to repair and is thereby bilged, these are not losses by perils of the sea.

§ 44. So shipwreck, stranding. This term also includes the loss by the attacks of pirates: in *Pickering v. Barclay*<sup>(i)</sup> this was expressly held, after the Judges had taken the opinion of merchants as to the custom and meaning of the terms among mercantile men.

§ 45. To come now to carriers whose liabilities are regulated by Statute. We have our Indian Railways. Their liabilities are defined in the Act referred to in the preceding section, (37) and will be found in Section IX to XV both inclusive.<sup>(j)</sup> Many cases have naturally arisen touching the liability of Railway Companies. But it is not my intention to pursue this subject here.

§ 46. Questions constantly arise as to what is the terminus of the transit. Such contention ordinarily arises in suits arising out of the claim to stop *in transitu*.

§ 47. The practical difficulty is to determine when the delivery is complete. It frequently happens that goods on their arrival at the terminal point, or at some intermediate point till they can be forwarded, are *warehoused*. Where the carrier and

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(i) 12 Roll Ab. 248.

(j) In England the Regulating Act is 17, and 18. Vic. ch. 31. called The Railway and Canal Traffic Act.

the warehouse-man are distinct parties, little difficulty can arise. But put the case of their being the same person. Here the original contract must be looked to, whether express or implied. In *Garside v. The Proprietors of the Trent and Mersey Navigation Company*<sup>(k)</sup>

"The Plaintiff, wanting to send goods from A to C hired the Defendants as common carriers to carry them to an intermediate stage B; and the Defendants also agreed to warehouse the goods without charge at B until they could be delivered on to the C carrier. The goods were accidentally burned while they were so warehoused, and before there was any opportunity of delivering them to the C carrier. It was held that the liability of the Defendants as carriers and insurers, had ended on the arrival of the goods at B; that their liability as warehousemen was a totally distinct liability; and that as the warehousing was gratuitous and for the convenience of the Plaintiffs, they were not liable in the absence of negligence."

§ 48. When the delivery to the consignee is beyond the limits of the carrier's transit, his liability may either terminate with a delivery over to a carrier authorized to forward on, or it may be prolonged up to the moment when the goods are delivered to consignee. But, in the absence of an agreement to the contrary, if a carrier receive goods which are addressed to a place beyond the terminus of his transit, he will be liable beyond such terminus, and up to the time when they ought to be delivered at the ulterior and ultimate point.

§ 49. The principle is, that when the carrier, originally receiving, accepts payment for the entire transit, the forward carrier is only his agent for that portion of the transit which he cannot complete himself. In *Mucshamp v. Lancaster and Preston Junction Railway*,<sup>(l)</sup> the Defendants, as common carriers, received a parcel directed to Bartlow, a place beyond Preston. The railway of the Defendants ended at Preston. The agent of the Defendants was requested to book the parcel, and was offered the charge for the whole distance; but he replied that it had better be paid on receipt by the con-

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(k) 4 Term Reports 581.

(l) 8. M. & W. 421.

signee. The parcel arrived safely at Preston and was there forwarded on by another Railway. It was lost on this part of the transit. *Rolfe*, B. told the jury that "when a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, and that the same rule applied although that place were beyond the limits within which he in general professed to carry on his trade of a carrier." In *Waston v. The Nottingham and Boston Railway Company*<sup>(m)</sup> "the Defendants were held liable for damages arising from the detention of the Plaintiff's goods on an ulterior Railway, by which the goods were forwarded on. This case is remarkable for the fact, that the Plaintiff had been expressly told, at the time when he delivered the goods to the Defendants, that they could receive payment only for the transit to their own terminus; but there was some evidence that their agent had told the Plaintiff that the goods would arrive in time at their ultimate destination. The Court confirmed the principle, that the ulterior Railway, must be taken to have been acting as agents of the Defendants, and that there was evidence of an original contract by the latter to carry the whole distance." *Erle*, J. stated the rule succinctly to be that, "where goods are received at one terminus for conveyance to another, the Company are answerable for all the intermediate termini and the receipt of such goods is *prima facie* evidence of liability." In *Scothorn v. South Staffordshire Company*.<sup>(n)</sup> The plaintiff had paid carriage for the whole distance of goods consigned to the defendants to be delivered in London. The defendants, according to their course of business, forwarded them from their terminus at Birmingham, by the London and North Western Railway to London. After the arrival of the goods at London, but before they had passed out of the hands of the London and North Western Railway, the plaintiff gave a countermand of the delivery to the agent of the latter Railway. The goods were, notwith-

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(m) 15. Jur. 448.

(n) 8. Exch. 341. S. C. 17 Jur. 214.

standing, forwarded on to their original place of consignment, and lost on the transit. It was contended for the defendants, that the agent of the London and North Western Railway was not an agent for the defendants to receive a countermand, but only to forward on the goods, as he had in fact done, to their address. But the Court held that the London and North Western Railway were agents of the defendants for all the purposes of the original contract, and that one of its essential elements was a right of countermand retained by the sender during the whole transit.

§ 50. The Carrier will be liable, although the terminus is beyond the jurisdiction—as where the goods start from London and the terminus is Edinburgh. See the case last quoted: and even where the terminus was out of England, the original carrier was nevertheless held liable. *Crouch v. London and N. W. Ry. Co.*(o)

§ 51. The following cases also bear upon the question of delivery, and show the duty of Railway Companies with regard to *passengers' luggage*, which they are very apt to seek to regulate by bye laws; that is to say by limiting their common law liability by special contract, which, as great monopolies, they are too much in the habit of forcing upon the public. In *Richards v. London and South Coast Company*(p) the plaintiff's wife, as a passenger, had intrusted her luggage in the van, but put her dressing-case under the seat in the carriage. On arriving at the terminus, the Company's servants had placed, as she thought, all her luggage in a hackney coach close to the platform; but it appeared subsequently that the dressing case was missing, and that it had not been placed in the hackney coach. The Court supported a verdict for the plaintiff on the ground that, according to the course of the Company's business, there was no complete delivery to the plaintiff's wife until the Company's servant had placed the dressing-case in the hackney coach. On the general principle, *Wilde, C. J.* said:

“The duty of common carrier is perfectly well understood; they give

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(o) 23. L. J. C. P. 73.

(p) 18 L. J. C. P. 251.



a warranty safely and securely to convey and deliver. It is immaterial whether there be negligence or not; the warranty is broken by non-delivery." "But it must not be inferred from this case that even common carriers will be liable in all cases for the non-delivery of a passenger's luggage when the passenger voluntarily and deliberately assumes the custody of it. Such a doctrine would be clearly opposed to every principle of common justice and common sense; and although it is not without authority, it can hardly be expected that it would be upheld in these days. It was said indeed, in *Robinson v. Dunmore*(g) that it had been determined that "if a man travel in a stage-coach and take his portmanteau with him, though he has his eye on the portmanteau, yet the carrier is not absolved from responsibility." But *Richards v. The London and South-Western* is by no means an authority in support of this view; and the language of *Wilde*, C. J. is clearly opposed to it. There it is clear that the judgment of the Court rested on the principle that there had been a complete bailment to the Company when the plaintiff's wife delivered the trunk to their servant; and that the act of placing it under the seat in the passengers' carriage, although apparently by her direction, and certainly with her sanction, was, notwithstanding, not her act but the act of the Company's servant, who in doing it was conceding only a gratuitous privilege which, as such, could have no effect in lessening the Company's antecedent liability. Any other view of this case is manifestly unreasonable and untenable."

And *Wilde*, C. J. said:

"There is nothing more common than for persons to put part of their luggage into the same carriage with them; and that may be done under such circumstances as never to cast any responsibility on the carriers; but that is to be proved. When this is done by the Company's servants the Company are not relieved from their liability as carriers in respect of it. So, a passenger taking a valuable article open and notoriously into the same carriage in which he travels, will not save the Company from responsibility. The case is quite different from that of goods which are about the person of a passenger, which are to be considered entirely under his personal controul and custody. In that case there is no delivery to or acceptance by the Company. Acceptance by the Company is the legal result of goods placed in their hands in the ordinary way in which they consent to receive them." "In the *Great Western Railway Company v. Goodman*,(r) was a case stated on appeal by the judge of a County Court. The plaintiff intending to travel by the railway to West

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(g) 2 Bos. and P. 419.

(r) 12 C. B. 313.

Drayton, took her ticket at the Paddington terminus, and paid the usual fare. She then called one of the Company's porters, and, having told him that she was going by the next train to West Drayton, desired him to label her luggage for that place, viz: two small boxes and a trunk. The plaintiff proved that she saw all the articles labelled, but could not swear that they were labelled for West Drayton. She then left the luggage with the porter and entered the train. On arriving at West Drayton she received only the two small boxes; and it was admitted by the defendants that the trunk had been stolen after its delivery to the porter."

"By a bye-law of the Company, which under their special Act was to be binding on all parties, the Company had announced that every passenger would be allowed to take a certain amount of luggage free of charge; but that the Company would 'not be responsible for the care of the same unless booked and paid for accordingly.' The plaintiff's luggage was within the allowed limit, but had not been booked nor paid for as such. It appeared, also, that the Company had made no arrangements for booking passenger's luggage; that it was not usual for such to be booked; and that a witness, who not long before had applied to book and insure his luggage, had been told by one of the Company's servants 'to give it to the porters and they would take care of it.'

"On these facts the defendants contended that they were not liable: first because the trunk had never been delivered to them; and secondly, because the bye-law absolved them. But the Court held there was a sufficiently clear case of *prima facie* liability made out against the railway, and sufficient evidence to warrant a verdict for the plaintiff."

"In this case the defendants were apparently sued as ordinary special carriers for hire. No point was made that they were common carriers, and liable as insurers. But the special facts appear to have been treated as forming a special contract, to convey safely, and to deliver safely. The effect of the bye-law was regarded as neutralised by the conduct of the defendants, which showed constructively that they had not intended to enforce it; and the nature of the contract was held to be simply a question of evidence. Still, it must be understood that such a contract is not an absolute contract to deliver, but merely to us that ordinary care which is exacted from special carriers for hire. The implied, although not the expressed, ground of the verdict for the plaintiff, must be taken to have been the negligence of the defendants; of which, in the absence of opposite evidence of due care on their parts, the proof of the loss was sufficient *prima facie* evidence." In *Butcher v. The London and South Coast Railway*, "The plaintiff, on entering the railway carriage, had his

portmanteau placed in the luggage-van ; but kept with him, during the whole journey, a small hand bag containing money and valuables worth £240. When the train arrived at the terminus, the plaintiff got out on the platform with the bag in his hand. A Company's servant then inquired of him whether he should get him a cab ; and on an affirmative reply took the bag, and stated subsequently that he had placed it on the footboard of the cab which he had engaged ; but when the plaintiff (who had remained to take care of his portmanteau) got there, he found that the bag had disappeared, and the driver denied that it had ever been put on the cab. It also appeared to be the usual course for the Company's servants to assist gratuitously in removing passengers luggage from the trains to the authorized cabs in attendance, of which the plaintiff's cab was one. The Jury found generally for the plaintiffs ; and the Court held that there was evidence to support the verdict."

§ 52. The consignor has a right to countermand his goods or alter their place of destination. Thus in *Scothorn v. S. Staff. Ry. Co.*<sup>(a)</sup>

Goods were delivered to the Defendants to be sent to London and forwarded to Australia ; but before the goods arrived in London, the plaintiff countermanded the order to forward them to Australia. The goods were notwithstanding forwarded to Australia and lost. It was held, that the plaintiff had a clear right to give the countermand ; and that the defendants were liable for not obeying it.

§ 53. In *Bourne v. Gatliff*<sup>(b)</sup> the question was much considered.

It was there holden by the Courts of Common Pleas and Exchequer Chamber, and by the House of Lords, that in the absence of any course of dealing or usage of the part to justify him, a carrier by sea under a bill of lading of goods to be delivered 'at the Port of London, (all and every the dangers of the sea &c. excepted,) unto Mr. Samuel Gatliff or assigns, on paying for the said goods freight,' &c., was not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods ; and that, having so landed them on a wharf, where before coming to the hands of the

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(a) 22 L. J. Ex. 121.

(b) 4. N. C. 314. 11. Clk. and Fin. 45.

owner, they were destroyed by accidental fire, the carrier was responsible for their loss.

§ 54. Where goods consigned to a vendee are lost through the default of the carrier, the consignee is the proper person to sue, for the consignor was his agent to retain the carrier. *Davis v. Peck*<sup>(u)</sup> *Dalton Solomonson*,<sup>(v)</sup> *King v. Meredith*,<sup>(w)</sup> *Brown v. Hodson*.<sup>(x)</sup> But it is otherwise where the goods were sent merely for approval, *Swain v. Shepherd*,<sup>(y)</sup> or the consignee is the agent of the consignor, *Sargent v. Morris*,<sup>(z)</sup> or the carrier has contracted to be liable to the consignor in consideration of the latter's becoming responsible for the price of the carriage; *Moore v. Wilson*,<sup>(a)</sup> *Davis v. James*,<sup>(b)</sup> (or where the property in the goods has not yet passed to the vendee, as, for instance, when there is no evidence of contract sufficient to satisfy the Statute of Frauds, and the carrier is not of the vendee's selection, *Coats v. Chaplin*,<sup>(c)</sup> *Norman v. Phillips*,<sup>(d)</sup> or, to speak generally, where the carrier is employed by the consignor, and the goods are at his risk. *Dunlop v. Lambert*.<sup>(e)</sup>

§ 55. Where no time within which the transit is to be performed is stipulated, the law will presume that a *reasonable* time was in the contemplation of the parties. So in *Raphael v. Pickford*.<sup>(f)</sup> But in *Hughes v. The Great W. Ry. Co.*

The Plaintiff's case was that the Defendants, as common carriers, had undertaken to convey the Plaintiff's pigs from Sonthall and deliver them at Birmingham within a reasonable time. The breach was, that the Defendants had improperly delayed the delivery until after the expiration of such reasonable time: in consequence of which delay the Plaintiff lost the Birmingham market. The Defendants set up a special contract signed by the Plaintiff, by which the Defendants declared that they

(u) 8. T. R. 330.

(v) 3. B. & P. 532.

(w) 2. Camp. 639.

(x) *id.* 36.

(y) 1. M. & Rob. 224.

(z) 3. B. & A. 277.

(a) 1. T. R. 659.

(b) 5 Burr. 2680.

(c) 2. Cl. & Fin. 600.

(d) 2. Q. B. 483.

(e) 14. M. & W. 277.

See *Freeman v. Birch*. 1. Nev. & M. 420. 6 Q. B. 492. n. s. C.

(f) 5. M. and Gr. 551. 23. L. J. 153. C. P.

'would not be held responsible for the carriage or delivery within any certain or definite time, nor in time for any particular market.' There appeared to have been considerable delay; but the Defendants forwarded the pigs by the ordinary goods train, which did not, however, arrive at Birmingham until after the market. *Jervis*, C. J. held, at the trial, that the Defendants had forwarded the pigs by the first practicable train, although not by the first train, and, therefore, within a reasonable time; and nonsuited the Plaintiff.

This case seems questionable—at any rate it was determined on the special contract.

§ 56. The last class of Bailment is that of *mandatum*; when goods are entrusted to some one who is to carry them, or do something to them *gratuitously*. It might fall under the first head. The liabilities in both cases are the same.

§ 57. It may not be out of place to notice here, that generally speaking, a Bailee cannot be guilty of larceny of his bailment at Common Law; for all theft presumes a trespass in the original taking; and here the original possession was lawful, and *not invito domino*. Thus if goods are delivered to a carrier and he steals them, without breaking bulk, on the journey, it is no felony. So if a watch be sent to a watchmaker to repair and he sells it, it is not larceny. So in *Maddox, case* (g) where a captain, in whose ship several casks of butter were stowed, the principal number being in the hold, battened down, but some were on deck, being driven into port by stress of weather, sold, as his own, some of the casks which were on deck, and, upon arriving at his destination, told the consignee that the casks had been thrown overboard, the judges held this to be no larceny; but it seemed to be admitted, that if the Defendant had broken bulk by taking the casks from the hold, it would have been otherwise.

The Captain of a vessel having a number of casks of butter belonging to the prosecutor to carry on board his vessel, and having occasion to pay a debt contracted by him at a port in course of his voyage, gave an order

to his mate to deliver thirteen casks of butter to his creditor, and the casks were delivered accordingly. Being indicted for Larceny, *Graham*, B., before whom he was tried, thought that the severance of a part of the casks from the rest, and the formed design of doing so, took the case out of the authorities cited,<sup>(k)</sup> if they could be considered as applying to the case, and the prisoner was convicted; but upon a case reserved, the Judges were of opinion that it was not Larceny, and that the conviction was wrong.

§ 58. Nice distinctions have been drawn as to the Bailee's original taking not being *animo furandi*; and other niceties have been raised as to the termination of the bailment. Thus if a man *in transitu* take the *whole* of a package delivered to him, it was held to be no larceny; but if he *break bulk*, and take a part, it is theft! Lord *Hale* has so laid it down.<sup>(l)</sup>

"If a man deliver goods to a carrier to carry to Dover, and he carries them away, it is no felony, but if the carrier have a bale or trunk with goods in it delivered to him, and he breaks the bale or trunk, and carries away the goods *animo furandi*, or if he carries the whole pack to the place appointed, and then carries it away *animo furandi*, it is a felonious taking. But that must be intended when he carries them to the place, and delivers or lays them down, for then his possession by the first delivery is determined, and the taking afterwards is a new taking."

§ 59. These niceties—*apices juris*—have fortunately been reached in this country by the Breach of Trust Act<sup>(j)</sup> and more recently by the Penal Code.

§ 60. We cannot quit the subject of Bailments without noticing that very common kind which is specifically called Mortgage, and which, as distinguished from a *Pledge* of movable property, is usually applied to bailments of immovable property, such as houses or land: though of course there may be also *Mortgages* of personal property, which differ from a mere *Pledge*, inasmuch as the former transfer the *property* in the

(k) 1. *Hale*, P. C. 504; 2. *East*, P. C. 693.

(l) 1 *Hale's* P. C. 504.

(j) 13 of 1850, and see 16 of 1850 and the Penal Code, Sec. 3 461-2.

chattel, the latter only the *possession*, and a right of retainer until the principal debt and interest be satisfied. Thus in *Jones v. Smith*.<sup>(k)</sup> Sir R. Arden, the Master of the Rolls said,

"A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time: a pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation or the course of trade, to be a lien upon them.

§ 61. Sometimes the land or property pledged is handed over to the pledgee (by way of usufruct) to reimburse himself out of the rents and profits his principal interest and charges; and this is not strictly speaking a mortgage: but a *vivum vadium* or living pledge; since the estate never dies to the mortgagor, but is his throughout; and he has even a right at law to recover the land whenever the money advanced to him shall have been paid, by the pledgee having recouped himself out of the rents and profits. "*Vivum autem dicitur vadium*," says Lord Coke "*quia nunquam moritur ex aliquâ parte quod ex suis proventibus acquiritur*."<sup>(l)</sup> But in *Mortgage*, properly so called, where the land is conveyed to the mortgagee in fee, or for a term of years, or the title deeds are deposited with the mortgagee, so as to constitute an equitable mortgage,<sup>(m)</sup> though the possession continues in the mortgagor, on condition that if the debt be not paid by a given day, the mortgagor should have no right of entry; on non performance of the condition at the day named, the estate was absolutely dead, at law, to the mortgagor, and became absolutely the estate of the mortgagee, and hence the derivation of the term from the French *mort* and *gage*, *mortuum vadium*, *dead pledge*.

§ 62. This *vivum vadium* is very common in this country;

(k) 2. Ves: Junior 378.

(l) Co. Litt. 205.

(m) This equitable mortgage was known to the Roman Law. "*Pignus contrahitur non solâ traditione, sed etiam nudâ conventione, etsi non traditum est*," is the language of the Digest. C 13. tit: 7 C. 1. The Mahomedan Law requires seizin or actual possession to complete the security. Main: M. L. 74. The Hindu Law originally required seizin in pledges: but *hy pothecation* (i. e. pledge without giving possession) has long obtained. 1 Str: 289. See Morton's Rep. 111.

and recognized as a Usufructuary mortgage.<sup>(n)</sup> We find it also practised in Wales, and it is frequently spoken of in our books as a Welsh mortgage. It was known in the Roman Law as *pactum antichreseos*; the Greek derivation of which shows its origin; for it was common among the Athenians, and is generally thought to have been invented by them; though Sir Thomas Strange questions whether it is not to be traced back to the Hindus. Here the land is handed over to the creditor simply to repay himself out of the rents and profits: and in these transactions it is clear that the debtor has always a right to possession of the estate when the debt is liquidated. If the question in dispute is whether the debt and interest have been entirely discharged, as is generally the bone of contention, the debtor will be entitled to an account of the profits made by his creditor, and to repossession, if he can show that the full equivalent of the original debt and interest has been received.

§ 63. Where the usufruct is in lieu of interest, no account of interest will be taken; whether the mortgagee makes a profit or loss, he has his chance. When the principal has been repaid, the mortgagor has a right to his estate back.<sup>(o)</sup>

§ 64. "The repeal of the usury Laws," writes Mr. Macpherson<sup>(p)</sup> (Act XXVIII of 1855) "has created a great change in the position of usufructory mortgages; and agreements made since it took place, will be strictly enforced even although such as to give the mortgagee interest at a higher rate than 12 per cent. per annum. Section 4 of Act XXVIII of 1855, enacts that a mortgage or other contract for the loan of money, whereby it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties. By Section 5, whenever, under the Regulations of the Bengal Code, a deposit may be made of the principal sum and interest due upon any mortgage, or conditional sale, of land thereafter to be entered into, the amount of interest to be deposited shall be at the rate stipulated in the contract, or if no rate has been stipulated and interest be payable under the terms of the contract, at the rate of 12 per cent. per annum;

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(n) The Mahomedan Law does not permit the mortgagee to use the pledge without special agreement.

(o) See 60 of 1847. Mad. S. R. vol. for 1850, p. 2.

(p) On Mortgages 146.



provided, that in the latter case the amount deposited shall be subject to the decision of the Court, as to the rate at which interest shall be calculated. By Section 6, in any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage or conditional sale of landed property, or other contract whatsoever, entered into after the passing of the Act, interest is to be calculated at the rate stipulated therein. If no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, it shall be calculated at such rate as the Court shall deem reasonable. The effect of the change is simply to bind parties strictly by the terms of the contract they have made. When the agreement is that the usufruct is to be taken in lieu of interest, the mortgagee will not be liable to account, however large his receipts may be; he will be entitled to continue in possession, until the principal is paid to him. If there is no mention of interest at all, it will be for the Court to say whether any is to be allowed, and at what rate. If any rate is mentioned, it will be calculated at that rate whatever it may be. In the two latter cases the mortgagees will be liable to account, but will have to account only on the strict terms of his agreement."

§ 65. But in cases strictly of Mortgage, where the property is absolutely conveyed to the creditor, the debtor will nevertheless be entitled to a reconveyance on tender of payment of the debt and interest at any reasonable time, estimated at 20 years in England, after the day named originally for payment; for Equity will look to the real nature of the transaction; and if it is clear that a sale was not meant, that however the deed may be expressed, the property was in reality handed over as security for a loan, it will not allow advantage to be taken of the necessitous man's condition, and convert the transaction into one not contemplated by the parties themselves, or in the phrase of our text books 'Once a Mortgage always a Mortgage.' By the Hindu Law no title is required by prescription. Redemption may be had at any time,<sup>(2)</sup> and the Regulation of Limitation II of 1802. Sec. XVIII. Cl. 4, which fixes the ordinary period at 12 years, expressly excepted claims or mortgages, the period for rendering which obsolete and unactionable is to be determined by the laws

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(2) 1. Str. 292.

of the country. The limitation of such suits is now fixed by the Limitation Act XIV of 1859. See Sec. 151 Cl. 15. The Mahomedan Law knows no bar by limitation.

"And therefore," writes *Macpherson* "when, after a lapse of many years, the representative of the mortgagor sued to redeem, the fact that neither he, nor his father, nor his grandfather, all of whom in turn represented the original mortgagor, were ever in possession of the property, was held to be no ground of objection to his succeeding in his claim. But this rule, of course, applies only to the right to redeem the land, not to the right to recover mesne profits, or profits come to the mortgagee's hands, after the mortgage debt had been liquidated in full, and when the mortgagor might have had himself put in possession if he had chosen. And if after the mortgage debt has been in fact paid off, from the usufruct of the land, the mortgagor is contented to wait more than twelve years before he advances his claim to possession, he is at liberty to do so, but he will not be allowed *wasilat*, or mesne profits, except for the twelve years immediately preceding the institution of his suit,—in like manner as under similar circumstances, he could not claim the amount due on a bond, or the rent accrued on land."

These are decisions of the N. W. P. Court. See M. S. A. R. p. 36. No. 47 of 1849.

§ 66. It is to be observed that the exception to the Limitation rule does not apply to a suit by a mortgagee; such a one therefore must bring his suit in conformity with the provisions of the Limitation Act.

§ 67. Of course where the deed itself contains a clause for the reconveyance of the estate upon payment of debt and interest, it is itself the best evidence that the transaction was one of mortgage and not outright sale; but even where the deed on the face of it purports to be an outright sale, and no such provision is expressed, Equity will nevertheless allow the debtor to obtain back his estate on payment, if the Court is satisfied that the transaction is one of loan and not of purchase. This is called the Equity of Redemption. The Emperor Constantine abolished the *pactum commissarium* or clause of forfeiture in Roman pledges. The mortgagee is a trustee for the

mortgagor; though the trust is one of a peculiar nature. The leading case on this point is that of *Cholmondeley v. Clinton*.<sup>(s)</sup> There Sir Thomas Plumer, M. R. said

“As to the position of the mortgagee being a trustee for the mortgagor, upon which so much of the argument is built, that the consequences contended for would not follow, even if the character of trustee did properly belong to the mortgagee, not being in actual possession, I have already endeavoured to show. It may be proper, however, to consider how far, and in what respect, he is to be considered as possessing that character. The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a Court of Equity. Lord Mansfield, advertg to the comparisons made in respect to mortgages, has, I think, said there is nothing so unlike as a simile, and nothing more apt to mislead. A mortgagor has had ascribed to him a variety of different characters in which there existed some points of resemblance, when it was not very material to ascertain what its powers or interests were, or to settle with any great precision in what respects the resemblance did, and in what it did not, exist. But it would be productive of much error, if it were to be concluded, that the resemblance was complete in every point, to any one of the ascribed characters. The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, of trustee and *cestui que trust*, have been applied to the relation of mortgagor and mortgagee, according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee. *Quo teneam vultus mutantem Protea nodo*. The truth is, it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterize the relation. They are (as Mr. Justice Buller observes, in *Birch v. Wright*) characters as well known, and their rights, powers, and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract. It is only raised by implication, in subordination to main purposes of it, and after that is fully satisfied. Its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He acquires a distinct and independent beneficial interest in the estate; he is always a qualified and limited right, and

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(s) 2. T. and W. 182.

may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by an adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and *cestui que trust*. They have always an identity and unity of interest, and are never opposed in contest to each other. The late Master of the Rolls observes, that, in general, a trustee is not allowed to deprive his *cestui que trust* of the possession. But a Court of Equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked. By not interfering in this latter case, a Court of Equity does not, as it is supposed, in opposition to its usual principle, refuse to afford protection to a *cestui que trust* against his trustee. But the interference is refused, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and *cestui que trust*. The mortgagee, when he takes the possession is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in Equity dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. Upon the same principle the mortgagee is not prevented, but assisted in Equity, when he has recourse to a proceeding, which is not only to obtain the possession, but the absolute title to the estate by foreclosure. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest by the person, claiming to be the mortgagor, is a recognition of that relation subsisting between them; but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor. The ground on which a mortgagee is in any case and for any purpose considered to have a character resembling that of a trustee, is the partial and limited right which in Equity he is allowed to have the whole estate legal and equitable. He does not at any time possess, like a trustee, a title to the legal estate, distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either, he is fully entitled to both, and to the legal and equitable remedies incident to both. But, in Equity, his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than and as may be necessary to secure the repayment

of the money due to him. When that is paid, his duty is to reconvey the estate to the person entitled to it. It never remains in his hands clothed with any fiduciary duty. He is never entrusted with the care of it; nor under any obligation to hold it for any one but himself; nor is he allowed to use it for any other purpose. The estate is not committed to his care; nor has he the means of preventing, or being acquainted with the changes, which the title to the Equity of Redemption may undergo, either by act of mortgagor, without his privity, or by operation of law, by descent forfeiture, or otherwise; and consequently, as I have already endeavoured to show, by the operation of the analogy, to the statute of limitations."

§ 68. This Equity of Redemption is so inseparable from a mortgage, that even if the parties by the deed should declare the estate to be irredeemable on payment at the time named, such a stipulation would be utterly void. A distinction however is taken between a mortgage and a *conditional sale* or an agreement for a repurchase, and if the transaction can be satisfactorily established to have been a sale, and not a colourable transaction to disguise a loan, it will be held valid; but such transactions are jealously watched, in order that undue advantage may not be taken of the necessities of the indigent. See Butler's Note<sup>(c)</sup>

"And in one case, where there was an absolute sale, with a condition, that if the vendor repaid the purchase money and interest by a fixed day, the purchaser should reconvey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held, that 'redeemable sale,' and 'mortgage by conditional sale,' were in their nature identical, and 'merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed, only in the same manner as a mortgage by conditional sale could be.'"

§ 69. Mortgages may be created without any particular form of contract, and need not be in writing; for no contract need be in writing according to the Hindoo law, and as we have said, it may be implied in Equity from the acts of the parties,

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(c) (1) Co. Litt. 204.

as where there has been a bare deposit of title deeds upon the occasion of a loan or to secure past or future advances.

§ 70. The Equity of Redemption is a saleable interest in the land, one which may be taken advantage of by any one in privity with the mortgagee, as his representatives or assigns: and any such person has a right to redeem the mortgage upon payment or tender of payment to the mortgagor, his representatives, or assigns.

§ 71. Tender, according to the English Law, must be in cash. But in a case in *N. W. P. R. v. 8. p. 447* the Court held, on the principle that the intention of the parties was substantially satisfied, that a tender of Company's paper, the nominal value of which was equal to the amount of the debt as it stood at the time of tender, was valid. Upon satisfactory proof of tender, the mortgage will cease to carry interest from the date of the tender.

§ 72. Notwithstanding Equity will never acknowledge that the mortgagor has not an Equity of Redemption, the mortgagee has a right at any time after the condition for payment has been broken, to call upon the mortgagor to redeem, and to pray the Court that in event of payment not being made within a reasonable time to be fixed by the Court, then the mortgagor may, what is called, stand foreclosed; that is, be declared to be no longer entitled to redeem, and that the Estate may be sold to satisfy the mortgagee debt. When the mortgage instrument contains, as frequently happens, a power of sale upon condition broken, the mortgagee may proceed to sale without intervention of a Court; but still it is perhaps the more prudent course to have recourse to the machinery of a Court, which will wind up all questions between the parties before decreeing a sale. Where this is not done, many questions likely to lead to litigation may arise; for instance whether the sale was fair, a fair price obtained, accounts duly rendered, and the like. Moreover there may be many persons beneficially interested in the surplus proceeds of the sale; all of which matters a Court will arrange by its

decree. In a Bengal Case<sup>(u)</sup> the Court has distinctly declared that a power of sale without the intervention of the Courts is invalid, unless the mortgagor has been a consenting party to such sale.

"Such a condition" writes *Macpherson*, "might be perfectly consistent with the laws of a great commercial country, affording every facility to the capitalist lender, but, at the same time, be quite inconsistent with the laws of a country deriving the great bulk of its revenue from the land, and as a recompense for the stringency of the rules under which it is compelled to collect its revenue in order to carry on the Government, (sale of the estate being the penalty of default,) affording every possible protection, in his private transactions, to the land holding borrower. The Regulations will be searched in vain, for any express enactment prohibiting the sale of a mortgaged estate under a power of sale. But such a power is repugnant to the principles of the Regulations, enacted by Government for regulating the transfer of immovable property in satisfaction of debt in general, and in satisfaction of debts on mortgage in particular. The Regulations do not sanction, in any case, the transfer of immovable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself."

§ 73. Where payments have been made, an account will be taken of what is due. The debtor, upon the sale realizing more than the debt interest and costs, will be entitled to the surplus. The mortgagee is entitled to his costs, unless indeed he has litigated unnecessarily; as where the mortgagor has tendered him payment before suit brought.

§ 74. As to the method of taking the account and computing interest where there is a usufructory mortgage, see Regn. XXXIV of 1802. S. 8. and Mad: S. A. D. No. 61 of 1847. p. 27 of Vol. for 850.

§ 75. It frequently happens that farther advances are made by the mortgagee on the security of the land already mortgaged: and the practice is fully recognized by the Courts. In such cases the land will be considered as mortgaged for the amount of both original and subsequent loans; and such loans by way of further charge are not to be considered as inde-

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(u) S. D. A. 1847, p. 354.

pendent transactions. The accounts on both the original and subsequent loans will be taken together.

§ 67. "Nothing" writes *Macpherson*, "can ever deprive the mortgagor of his right to have the accounts of the mortgagee in possession taken, not even an admission in his plaint that something may possibly still be due on the mortgage. And the *onus probandi* does not lie upon the mortgagor; that is to say, he is not bound to prove, independently of the accounts filed by the mortgagee, that the mortgage debt has been paid off. But if he fails eventually to prove that it has been satisfied, his suit will be dismissed with costs."

"And a condition in a mortgage deed that the mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any degree bar the operation of the law, by which the lender is to account to the borrower for the proceeds during his possession. As a general rule, the mortgagee may be called on to account by the mortgagor at any time, on the mortgagor's allegation that the whole sum due with interest has been received by him."

§ 77. A mortgagor or mortgagee cannot claim to foreclose or to redeem for a part of the estate or the debt. Thus in *S. D. A. for 1852*, p. 288, where

"Four villages were together mortgaged for a certain sum: the interest of the mortgagee in two of them was afterwards sold, and the purchaser sued to redeem these two, on payment of what he considered to be the proportion of the advance secured upon them. It was held, that the charge on the four villages could not be broken up, and that the mortgage had a lien on the two, as on the four, for the whole mortgage debt, and in *N. W. P. Vol. 8. p. 473*. A single deed of mortgage, in security for an advance of rupees 2,000, was executed for two mouzas, each being a separate jumma. The mortgagor then applied to the revenue officer for change of registry on behalf of the mortgagee, representing each mouza to have been pledged for Company's rupees 1,000. Separate applications were necessary for each mouza, by reason of their being separate jummas in the books. A few days afterwards, the mortgagee applied for registration in the usual form making no mention of there being any separate advance or lien on each mouza. The Collector, however, issued the usual notification in conformity with the specification of the mortgagor. But the Court, nevertheless, held that as the deed conveyed a lien on both mouzas



for the entire loan, neither of them could be redeemed without payment of the whole of that debt."<sup>(v)</sup>

§ 78. Where there is more than one mortgagee of the same property, the first mortgagee will be entitled to priority; and if on a sale the estate does not realize more than sufficient to cover the first mortgagee's claim, the purchaser will be entitled to hold the land free from all subsequent incumbrances<sup>(w)</sup>

§ 79. And note here the effect of registry by subsequent purchaser or mortgagee, where the first incumbrancer has neglected this precaution. Regn. XVII. of Sec. VI. Cl. 2. 3.

§ 80. Where a mortgagor has covenanted to place the mortgagee of a usufructuary mortgagee in immediate possession, and refuses, or is unable to do so, the mortgagee may at once sue for his money and interest, even though the money by the terms of the instrument was not repayable for 20 years<sup>(x)</sup>; and in N. W. P. Vol. XI. p. 115.

"The deed of mortgage is of the nature of mortgage with possession, being redeemable at any time, and the original mortgagee's possession having been disturbed by the act of the mortgagor which introduced the auction purchaser in their place, such act amounted to a wrongful dispossession, and fully justified the mortgagee in bringing his suit for the amount of mortgage debt, it having been repeatedly held that when the mortgagor has committed a breach of contract, he cannot claim fulfilment by the mortgagee of what was to be performed on his part."

§ 81. But where the agreement was that the surplus proceeds of a certain Talook should be the fund for the extinguishment of the debt, and that in default the mortgagee *might sue for possession of the estate*, this was held to preclude him from suing for recovery of the debt.<sup>(y)</sup>

§ 82. A subsequent mortgagee in England and America has a right to redeem a prior mortgagee, he himself being subject to be redeemed by those below him. The Company's Courts

(v) See *Watts v. Symes*, 16 Jur. 114-2. Spence 666. (w) N. W. P. Vol. 10. p. 227.

(x) 4 Moore's L. Apl. Cases; and See N. W. P. Vol. 8. p. 286.

(y) N. W. P. vol. 3 p. 331.

in Bengal have denied this right; on which Mr. *Macpherson*<sup>(2)</sup> makes the following just observations.

“That a subsequent mortgagee should have the right of redeeming a prior mortgagee by conditional sale, if such is really the case, is a most peculiar feature in the law of mortgages. It is in direct opposition to the principle which is the basis of the rule, that a purchaser of the mortgagor's whole interest, has the same right of redemption that his vendor had. The estates of a mortgagee and of an absolute purchaser are alike, only that of the former is subject to be divested on the happening of certain events. A mortgagee is, in fact, the purchaser of the rights of the mortgagor: he buys them, but gives the mortgagor the chance of repurchasing within a certain period. In England and in America, it has always been held, that every person being a subsequent incumbrancer, or having a legal or equitable lien on premises already subject to a mortgage, may insist on a right to redeem, on payment of the principal, interests and costs, due to the party redeemed, he who redeems, being himself liable to be redeemed by those below him.”

“The refusal in the Courts here to recognize the right of a subsequent incumbrancer to redeem a prior one, has probably arisen from the principle being lost sight of, that the mortgage is merely a security for the debt, and collateral to it, and that if the debt is paid by one who has an equity over the land, the mortgagee has got all that he had right to, or that it was ever intended he should have. The transaction is treated by the Courts as one of absolute purchase to take effect on a certain day, but liable to become void in the event of payment by the mortgagor before that day. It is in fact dealt with, as it was in olden times by the English Courts, before the present system of Equity sprung up. The terms of the contract are followed literally, and as they contain no agreement for the re-payment to the mortgagee of the money advanced by him, it is considered that he looks to be repaid by getting possession of the property pledged, and by that alone, and that he is entitled to that possession, except in the one event of the mortgagor paying him off strictly in the mode agreed upon.”

§ 83. The following decisions are taken from the N. W. P. Reports touching repayment by instalments.

“When the mortgage debt is made repayable by instalments, on default of payment of any one of which the whole become payable, and the mortgagee may foreclose, limitation, as regards a claim for posses-

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(2) On Mortgages, 123.

sion, runs from the date of the first default, and a suit for foreclosure must be brought within twelve years from that date. Each separate instalment, however, is recoverable within twelve years from the date of which it fell due. And if a debtor makes payments in respect of instalments which are barred by lapse of time, he cannot afterwards say he need not have paid them, and set them off against later instalments which are not barred."

§ 84. It often becomes important to ascertain what is such an acknowledgment by the mortgagor or mortgagee as will take the case out of the Statute. "When the mortgagee" writes *Macpherson*<sup>(a)</sup> "has been in occupation of a house belonging to the Mortgagor, on the understanding that the rent should be credited to the mortgagor in liquidation of the interest due on the mortgage, and the rent has accordingly been so credited up to a date within twelve years prior to the institution of the suit, this is an acknowledgment of the mortgagee's claim, sufficient to prevent the limitation rule from barring a suit by the mortgagee for possession, although it was not brought within twelve years from the date when his cause of action originally rose."

"So the execution of a new bond, or the payment of a portion of the debt, within twelve years of bringing the suit (if such payment is not made as in full of all further claims, or is not accompanied by a denial of any further liability), is sufficient."

§ 85. The mortgage is always regarded as a *collateral security*, except where the deed otherwise expressly provides; and therefore if it does not realize the amount due, the mortgagor may still pursue his remedy as an ordinary decree holder against the mortgagee.

"The decree" writes *Macpherson*<sup>(b)</sup> "is always against the mortgagor personally, and if the land does not produce a sufficient sum, the mortgagee may still proceed against the mortgagor for the residue unpaid, as an ordinary decree-holder. And so, if the mortgagee chooses in the first instance to proceed against the mortgagor alone, he may afterwards, if his debt is not satisfied, enforce his claim on the land."

"A person on borrowing a sum of money, gave his bond for it: and the bond also pledged certain property, providing that any sale on mortgage of it until the lender's claim was satisfied in full, should be in-

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(a) On Mortgage, p. 167.

(b) p. 186.

valid. The lender afterwards brought a suit for the money in the Supreme Court, and obtained a decree. He attempted to execute his decree, as an ordinary judgment creditor, on the property pledged, but was resisted by some intermediate incumbrancers whom he found in possession. He then instituted a suit in a Mofussil Court to realise the sum which had been decreed to him, by setting aside the intermediate incumbrances, as illegal and contrary to the terms of his mortgage. It was held that, inasmuch as there was an express pledge of the lands to him, and a proviso that any sale or mortgage of them prior to the payment of his debt should be invalid, the mortgagee's having already obtained a decree for money, without any allusion being made to the sale of this particular property in execution, did not effect his lien, and that he was still entitled to bring the mortgaged lands to sale free from any subsequent incumbrances."

§ 86. On the other hand, as it is a collateral security, it expires on satisfaction of the principal debt *aliunde*. *Sublato principali tollitur accessorium.*(c)

§ 87. Those who desire to pursue this topic further, should consult Mr. Macpherson's work on mortgages. But it may be useful to note some of the principal decisions on mortgages pronounced by the Madras Sudder Court and Privy Council.

*Mortgage*: 1. May be constituted by two separate instruments; one an absolute Bill of sale and the other a defeazance. 2. Moore's I. A. p. 1, and see the instructive case of *Teruvengada Charry v. Terumala Charry*. 4th term of 1861. Supreme Court, Madras. See S. R. for 1861. p. 47.

2. A conveyance by lease and release subject to parol defeazance, was held a mortgage. 5 Moore's I. A. 72.

3. By one of several partners for benefit of the firm, binds the firm. 2. Moore's I. A. 487.

4. A penalty, that if loan not paid by given time, house is to be property of mortgagee, is not enforceable in Equity. 190 of 1858. S. R. for 1859. ib. S. R. for 1860. p. 26. S. R. for 1861. p. 7. ib. p. 251. p. 59. ib. p. 130. ib. p. 150. ib. p. 39.

5. Once a mortgage always a mortgage: The original character

of the transaction having been established, its continuance in the same character is to be presumed. S. A. 143 of 1857. S. R. for 1858. p. 26.

*Mortgagor*: 1. The vendee of a Mortgagor occupies his place, and may redeem. S. A. 20 of 1854. S. R. for 1854. p. 38.

2. A mortgagor may sell, though he is not in possession. ib.

3. After tender of amount due by Mortgagor, the Mortgagee, refusing to accept, becomes liable for rents; nor is the Mortgagor bound to deposit the amount if refused. S. A. 134 of 1857. S. R. for 1857. p. 213.

4. Mortgagor's right to redeem with reference to limitations. 3 of 1841. 1. See. D. p. 39, See. 22 of 1851. S. R. for 1852. p. 136. 32 of 1854. S. R. for 1854. p. 178. 52 of 1854. p. 206. See. S. R. for 1860. p. 39.

5. If a Mortgagor, at the time appointed for redemption, voluntarily carry into effect the stipulation for foreclosure, the Courts will not interfere to undo his act. S. R. for 1860. p. 262.

*Mortgagee*: 1. In possession, has a prior right to a subsequent purchaser. S. A. 152 of 1857. S. R. for 1858. p. 49. S. Point S. A. 166 of 1857. S. R. for 1858. p. 63.

2. A mortgagee fraudulently allowing the estate to be sold for arrears of revenue, is liable to the mortgagor for the damage done him. S. A. 129 of 1857. S. R. for 1858. p. 134.

3. A mortgagee may foreclose at any time. 23 of 1855. S. R. for 1855. p. 137. 99 of 1851. S. R. for 1851. p. 259. 66 of 1853. S. R. for 1855. p. 182. 77 of 1854. S. R. for 1854. p. 216. 152 of 1855. S. R. for 1856. p. 58.

4. Where mortgagor refuses to give possession in accordance with his agreement, mortgagee may sue for the repayment of the loan, and need not bring a suit for specific performance. 4 Moore's I. A. p. 444.

5. Accounts how taken, when mortgagee in possession. 6. Moore's I. A. p. 392.

6. Mortgagee is bound to produce accounts: and if he does not, no other evidence of produce allowable. 168 of 1857. S. R. for 1858. p. 19.

7. Mortgagee can only recover principal and interest, notwithstanding clause of forfeiture of the land in the bond.

*Narraina Chetty v. Ponniah Govindoo.* S. R. for 1853. p. 142.

*Inorgatozee v. Tirumala Iyenger.* S. R. for 1859. p. 178.  
ib. 191.

8. Lessee of mortgagee may be compelled to account for rent to mortgagee, though the land may have been redeemed by the mortgagor.

*Akambara Pillay v. Vencatamya.* S. R. for 1859. p. 152.

*Equity of Redemption.* 1. Its nature was considered in S. A. 49 of 1858. S. R. for 1858. p. 142 : and see S. A. 152 of 1855. S. R. for 1856 p. 58.

2. The vendor of mortgagor is entitled to : See *Mortgagor.*

3. Where lands were held on "permanent mortgage" for 31 years, they were held redeemable. 92 of 1851. S. R. for 1852. p. 91. After 60 years ; 168 of 1858. S. R. for 1859. p. 34. after 17 years from condition becoming absolute. 75 of 1859. S. R. for 1859. p. 93.

4. But when a specific time is agreed on, redemption not compellable before that time. 160 of 1859. S. R. for 1859. p. 23 S. R. for 1859. p. 28 : and as to a usage of Malabar not to redeem for 12 years. See 44 of 1855. S. R. for 1855. p. 137. See. S. R. for 1859. p. 34.

*Foreclosure.* See *Mortgagee.*

*Registration.* An unregistered mortgage is not invalidated by a registered sale under Act XIX of 1843. S. A. 30 of 1850. S. R. for 1851, p. 149.

*Interest.* 1. The principle of computation is laid down in S. A. 61 of 1847. S. R. for 1850. p. 27. See also 18 of 1848. S. R. for 1849. p. 65. and 40 of 1850. S. R. for 1852 p. 6.

2. Under Reg. 34 of 1802. S. 8. See 43 of 1858. S. R. for 1859. p. 52.

*Accounts.* See *Mortgagee.*

*Tender:* See *Mortgagor.*

*Flacking* is not allowed. 50 of 1853. S. R. for 1858. p. 112.

*Pre-emption.* A clause that mortgagee shall have right of, if mortgagor desirous of selling, is not contrary to law.

*Mootoosamy Govinden v. Iya Govinden.* S. R. for 1858. p. 21.

*Usury Laws.* 1. Where land was mortgaged prior to the repeal of, mortgagee can only be allowed the rate of interest *then* legal.

*Sooba Sastry v. Ramasawmy Iyen.* S. R. for 1859. p. 52.

In a *Usufructuary* mortgage, the profits are to be taken in lieu of interest; so that when the legal rate of interest would give a larger return than the profits, the mortgagee is not entitled to any thing beyond the profits. S. A. 60. of 1847. S. R. for 1850. p. 11: and See S. A. 61 of 1847. S. R. for 1850 p. 27. and S. A. 94. of 1853. S. R. for 1854 p. 12.

2. A usufructary mortgagee refusing to produce his accounts, cannot prove deficient produce aliunde. S. A. 168 of 1857, S. R. for 1858. p. 19.

3. See *Interest*.

*Limitations.* 1. Though ordinarily there is no limitation to a mortgagor seeking to redeem, yet where the claim has been openly denied and resisted, there will arise a limitation which will be computed from the time of such resistance. S. A. 30 of 1858. See S. R. for 1859. p. 191.

2. And such a denial has been *presumed*, when the mortgagor gave a third party a power to sue, and no further step had been taken for twenty years. S. A. 114 of 1858.

3. Mortgages are ordinarily not subject to limitation. S. A. 14 of 1854. S. R. for 1854. p. 125.

4. See *mortgagor* 4.

5. Limitations applying to a mortgagee not in possession. 120 of 1858.

*Conditional sale.* See S. R. for 1860. p. 93 (*Sed Quære*) and ib. p. 151.

*Managing Member.* A mortgage by, for family purposes, binds the family; nor is the mortgagee bound to see to the appropriation of the money be advances. *Sandaryen v. Setaramien.* S. R. for 1861. p. 1.

## TOPIC THE TWENTY-SIXTH.

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### EASEMENTS.

*In summa tria sunt per quæ inferior locus superiori servit : Lex, natura loci, vetustas, quæ semper pro lege habetur, minuéndarum scilicet litium causæ.*—DIG : L. II. FF. DE AQU.

§ 1. This topic is a further illustration of the maxim *Sic utere tuo, &c.* ; also of one of the fundamental principles on which the Civil Law starts, *suum cuique tribuere, &c.* ; and indeed there is no branch of our Law more indebted to the Roman Law for its rules, or in which the student will be rewarded with closer analogies or more copious illustrations from the *Corpus Juris*. In the Institutes the subject is considered under the head of *Prædial Servitudes* ; which comprise both the *Easement* and the *Profit à prendre* of the English Law.

§ 2. An Easement, strictly speaking, is merely the right to exercise a convenience over the property of a neighbour, as of light, air, water, or way. A *Profit à prendre* is the right to participate in the produce of the neighbouring soil ; as the *estovers* and *botes* of the Feudal law ; rights of pasturage, turbary, fishing, digging, for gravel, sand, and the like. The Civil Law drew no such distinction. *Inter rusticorum prædiorum servitutes quidam computari rectè putant, aquæ haustum, pecoris ad aquam adpulsum ; jus pascendi, calcis coquendæ, arenæ fodiendæ.* We may well consider the two, as the Roman law did, under one head.

§ 3. The term *Servitude* implies a right and an obligation ; the right is attached to the property which enjoys the benefit of its exercise ; and this tenement is called the *dominant tenement* ; the obligation is imposed on the property which is compelled to admit to the exercise of the right upon it, which



is called the *servient* tenement. The right must always be exercised *in alieno solo*, upon the property of a third party : whence, if the two properties ever coalesce in one and the same owner, the special right merges in the general right of property ; and the special right and the obligation are both extinguished. The new owner now enjoys the same benefits, not adverting to his neighbour, but by virtue of his own dominion ; *nulli enim res sua servit.*<sup>(a)</sup> But though extinguished during unity, it will revive on subsequent separation. The Easement attaches not to the person, but to the tenements ; and will follow with them notwithstanding any change in the ownership, either of the dominant or servient tenements.

§ 4. The obligation is in fact negative, *pati ; non, facere* : and the following passage from *Vinnius* well exemplifies this position.

*"Aio esse jus, quo dominus aliquid pati in suo, aut in suo non facere, cogitur, ex natura omnium servitutum. Pati in suo, puta re sua atentem, fruentem, per fundum suum euntem, agentem, aquamve ducentem, tignum in aedes suas immittentem. Nonfacere, veluti altius non ædificare, in suo non ponere quod luminibus ædium nostrarum aut prospectui officiat, &c. Plane enim ita servitus constitui non potest, ut quis aliquid cogatur facere in suo ; puta viridaria aut arbores prospectus nostri causa tollere, aut in suo pingere, quo amæniores nobis prospectum præstet, obligatio hæc erit, non servitus constituta ; et ideo, prædio alienato, non sequetur actio novum possessorem, ut fit ubi servitus constituta est ; sed in eum, qui id facere promissit, hæredemque ejus, actio in personam dabitur in id scilicet, quod interest, si non fiat quod promissum est, ut accidit in omni obligatione faciendi."*

§ 5. The English law furnishes the following instances of affirmative Easements.

1. Rights of way.
2. Right to discharge a stream of water, either in its natural state or changed in quantity or quality.
3. Right to discharge rain water by a spout or projecting eaves.
4. Right to support from a neighbouring wall.
5. Right to carry on an offensive trade.

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(a) See Gale 11, note a.

6. Right to hang clothes on lines passing over the neighbouring soil.
7. Right to bury in a particular vault.

The principal negative Easements are:—

1. Right to receive a flow of water.
2. Right to receive light and air by windows.
3. Right to support of neighbouring soil.

§ 6. Easements may also be divided into *continuous* and *discontinuous*, and into *apparent* and *non-apparent*.

*Continuous* servitudes are those of which the enjoyment is, or may be continual, without the necessity of any actual interference by man, as a waterspout, or right to light and air.

*Discontinuous* servitudes are those, the enjoyment of which can only be had by the interference of man, as a right of way, or a right to draw water.

*Apparent* servitudes are those, the existence of which is shown by external works (*ouvrages extérieures*), as a door, a window, a watercourse.

*Non-apparent* servitudes are those which have no external sign of their existence; as the prohibition to build on particular land, or to build above a certain height.

§ 7. The origin of Easements is either natural, from the relative situations of the tenements, or founded on contract; *express*, as where there is a grant; or *implied*, as where the right is established by proof of the length of time during which it has been enjoyed as a right; and in accordance with this is the Roman Law; see the passage at the head of this disquisition.

§ 8. According to the English Law, Easements being an incorporeal right, and therefore not the subject of *Livery*, (delivery) can only pass by deed under seal; they "lie in grant."<sup>(b)</sup>

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(b) See *Baird v. Fortune* 7 Jur. n. s. p. 926.

And therefore in *Cocker v. Cowper*,<sup>(c)</sup> where the plaintiff sued for the obstruction of a certain drain which had been originally constructed at the plaintiff's expense, on the defendant's land, by his consent verbally given: after it had been so enjoyed for some time, the defendant obstructed the channel, so that the water was prevented running as before; and it was contended, on the part of the plaintiff, that the license so given, having been acted upon, could not be revoked by the defendant; but the Court, without hearing the counsel for the defendant, held that the plaintiff was clearly not entitled to recover. With regard to the question of license, the Court said, "the case of *Hewlins v. Shippam* is decisive to show that an Easement like this cannot be conferred except by deed, nor has the plaintiff acquired any other title to the water. The mere entry into the close of another, and cutting a drain there, cannot confer a title."

§ 9. But in this country I conceive that this law cannot be held to apply; and that in cases, at any rate, where the defendant is not a British subject, an Easement may be acquired by verbal contract, in accordance with the general provision of the Hindu Law. We have no Feudal law here, causing the creation of the Easement to "lie in grant": no Statute of Frauds requiring the contract, as touching an "interest in land," to be reduced to writing. The Hindu Law is express as to a writing not being necessary to the validity of a contract; and reason and justice seem to require, that unless the question be fettered by technical considerations, arising from antiquated law or practice, a licence, where it has been granted *and acted upon*, should not be revoked at the option of the grantor: for *nemo potest mutare consilium in alieni detrimentum*: and it seems monstrous that after one man has entered, it may be, into vast expense, upon the faith of another's permission, he should perhaps be ruined by the arbitrary withdrawal of that permission. In *Webb v. Paternoster*,<sup>(d)</sup>

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(c) 1 C. M. & R. See also *Hewlins v. Shippam*, 5 B. & C. 221, and *Wood v. Lead-bitter*, 13 M. & W. 838.

(d) Palm. 71.

*Haughton*, J. lays down this very sensible rule; "a licence executed is not countermandable, but only where it is executory."

§ 10. In *Liggins v. Inge*,<sup>(e)</sup> *Tindal*, C. J. considered fully the question of the validity of parol licenses, and arrived at the same conclusion. There it appeared that the predecessor of the plaintiff, who was entitled to a flow of water to his mill, over the defendant's land, by a parol license, authorized the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working of the plaintiff's mill; subsequently the plaintiff complained to the defendants of the injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir; and, upon a refusal on the part of the defendants to do this, an action was brought. *Tindal*, C. J., in his judgment enters fully into the question of the validity of parol licenses:—

"It will be unnecessary" he says, "on the present occasion, to consider more than one of the questions which have been argued at the bar, viz. whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the defendants.

"The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do. It appeared in evidence before the arbitrator, that the bank of the river which had been cut down was the soil of the defendants, and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, and at their expense, in the year 1822, under a parol license to them given for that purpose by the plaintiff's father, the then owner of the mill; and that, in the year 1827, the plaintiff's father represented to the defendants, that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition with which requisition the defendants had refused to comply.

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(e) 5 M. & P. 712 s. c. 7 Bing. 682.

"The question, therefore, is, whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the license, is such a wrong done on the part of the defendants as to make them liable to this action.

"The argument on the part of the plaintiff has been, that such parol license is, in its nature, countermandable at any time, at the pleasure of the party who gave it; that, to hold otherwise, would be to allow to a parol license the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill, which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor, since the statute of frauds, as being an interest in, to, or out of lands, tenements, and hereditaments.

"If it were necessary to hold, that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shown to have passed from the plaintiff's father to the defendants under the license, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow; for, it cannot be denied, that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant as an incorporeal hereditament, and not by a parol license. But we think the operation and effect of the license, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the license, although such license is countermanded: and, consequently, that they are not liable to an action as wrongdoers, for persisting in such refusal.

"The parol license, as it is stated in the award of the arbitrator, was a license to cut down and lower the bank, and to erect the weir, strictly speaking, if the license was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be necessary consequence of such acts, it must be taken, that the object and effect of such license was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations. We do not, however, consider the object, and still less the effect, of the parol license, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before

accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

"Water flowing in a stream, it is well settled, by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which had the name of *res communes* and which were defined, things, the property of which belong to no person, but the use to all. And, by the law of England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any other. *Bealey v. Shaw*. And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become *publici juris* by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy, should be lost by abandonment. Suppose a person who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return; could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished; or that he could be compellable to pull down his mill, if the former mill owner should afterwards change his determination, and wish to rebuild his own? In such a case it would undoubtedly be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, that is, if he had licensed the other party to erect a mill, the same inference must follow with greater certainty. Or, suppose A authorizes B, by express license, to build a house on B's own land, close ad-

joining to some of the windows of A's house, so as to intercept part of the light, could he afterwards compel B to pull the house down again, simply by giving notice that he countermanded the license? still further, this is not a license to do acts which consist in repetition, as, to walk in a park, to use a carriage way, to fish in the waters of another, or the like; which license, if countermanded, the party is but in the same situation as he was before it was granted; but this is a license to construct a work, which is attended with expense to the party using the license; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a license to do something, that in its own nature seems intended to be permanent and continuing; and it was the fault of the party himself, if he meant to reserve the power of revoking such license, after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. Indeed, the person who authorizes the weir to be erected, becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

"Upon principle, therefore, we think the license, in the present case, after it was executed, was not countermandable by the person who gave it; and, consequently, that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter v. Brockwell*, which rests on the judgment in *Webb v. Paternoster*. We see no reason to doubt the authority of that case, confirmed as it has since been by the case of *Taylor v. Waters* in this Court, and recognized as law in the judgment of Mr. Justice Bayley, in the case of *Hewlins v. Shippam*, in the Court of King's Bench."

§ 11. It is true that an executory license is revocable by the Law of England. In *Wallis v. Harrison and others*,<sup>(f)</sup> "an action was brought by the reversioner, for digging up the soil and making embankments and a Railway over land in the occupation of his tenant. The defendant, among other pleas, pleaded, 'that before the close, in which &c., became the plaintiff's property, the Dean and Chapter of Durham, being seised in fee of the said close, agreed with the defendants that they should have license, liberty, power, and authority, to enter upon the said close, and to form, make and maintain certain roads, &c.: and that the said Dean and Chapter should ratify

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(f) 4 M. and W. 538.

and confirm the same to the defendants; and that before the plaintiff had any interest in the said close, the said Dean and Chapter gave and delivered to the defendants at their request possession of the said way leave, &c., over which the said roads now are, and at the same time when &c., had been constructed, with leave, license, authority and power to the defendants to enter and set out the same; whereupon, before &c., they entered and set out the same:’ the plea then alleged an indenture by which the Dean and Chapter ‘granted and demised, and granted, ratified and confirmed unto the defendants such full liberty, &c.; and averred that the defendants, by virtue of such leave, &c. and such interture, had made the road, and unavoidably committed the said trespasses.’ To this plea the plaintiff demurred, on the ground ‘that the right of making the road was a matter which lay in grant, and could only be conferred by deed and not by parol, and the deed mentioned in the plea, as it appeared oyer, did not amount to a confirmation of any prior license by deed. The Court held the plea to be bad, as such a license might be countermanded at any time by the owner of the land who granted it, and at all events could not be binding on his transferee.

Lord Abinger, C. B., said, in delivering judgment; “Then treating it as a plea of license, I think it is bad on general demurrer, because a mere parol license to enjoy an Easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed, that if a man out of kindness to a neighbour allows him to pass over his land, the transferee of that land is bound to do so likewise. But it is said that the defendant should have had notice of the transfer. This is new law to me. A person is bound to know who is the owner of the land upon which he does that which, *prima facie*, is a trespass. Even if this were not so, I think the defendants ought, in excuse of their trespass, to have pleaded the fact that they had no notice of the transfer. It is true it would be the assertion of a negative, but I think this would be one of those cases where, to make a title or excuse good a negative should be shown on the pleadings, even if the proof of the affirmative might be on the opposite party. As to the case of *Webb v. Paternoster*, the grant of the license to put the hay stack, on



the premises was in fact a grant of the occupation by the hay stack, and the party might be considered in possession of that part of the land which the hay stack occupied, and that might be granted by parol." And *Parke*, Baron, added, "Then, with regard to the license, the plea is bad in substance. We are not called upon in this case to consider, whether a license to create or make a Railroad, granted by a former owner of the soil, is countermandable after expense has been incurred by the licensee, which was the question in *Winter v. Brockwell*; for it is not alleged that there has been any expense incurred in consequence of the license, and therefore it remains executory; and I take it to be clear, that a parol executory license is countermandable at any time; and if the owner of land grants to another a license to go over or do any act upon his close, and then conveys away that close, there is an end to the license; for it is an authority only with respect to the soil of the grantor; and if the close ceases to be his soil, the authority is instantly gone. *Webb v. Paternoster* is very distinguishable from this case, for there the license was executed, by putting the stack of hay on the land; the plaintiffs there had a sort of interest against the licensor and his assigns: but a license executory is a simple authority excusing trespasses on the close of the grantor, as long as it is his, and the license is uncountermanded, but ceases the moment the property passes to another."

§ 12. But bearing in mind the peculiarities of the laws of England with regard to the creation of incorporeal rights, and the effect of the Statute of Frauds, it appears to me, that a permission granted by parol by the owner of one tenement to the owner of another, to derive some benefit from the former in the nature of an Easement, even where executory, would be enforceable by suit in the Courts of this country.

§ 13. The cases of express Grant are comparatively few. Easements generally rest upon usage, from which is implied an original grant.

§ 14. Upon the severance of a tenement, mutual grants will be implied of those Easements without which the property cannot in its new condition be enjoyed by its several proprietors; in the words of *Bracton*, "*Omnia jura prænata et omnes servitutes sunt de pertinentiis tenementorum, et pertinent a tenemento ad tenementa; et habent hujusmodi pertinentiæ suas pertinentias, sicut ad jus pascendi et ad pasturam pertinent via et liber ingressus et egressus; et eodem modo ad jus fodiendi, falcandi, et secandi, hauriendi, polandi, pis-*

*candi, venandi, et hujusmodi, liber accessus et recessus, scilicet via, iter, et actus, ratione diversorum usuum ut suprâ. Item ad jus aquæ ducendæ pertinet purgatio; item ad iter, secundum quod est de pertinentiis pertinentiarum, vel de pertinentiis per se, ut si via per se concedatur sine aliâ servitute pertinet resectio, sicut ad aquæ ductum pertinet purgatio.*" For "*cuiusque aliquis quid concedit, concedere videtur et id sine quo res esse non potuit.*" Thus, says *Rolle*, in his Abridgment, "if I have a field inclosed by my own land on all sides, and I aliene this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant.

"And the grantor shall assign the way where can best spare it."

And Serjeant *Williams*(g) lays down the rule thus:—

"Where a man, having a close surrounded with his own land, grants the close to another in fee, for life, or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself."

If I reserve trees in a lease, (as is frequently done in India in letting bungalows, when the compound has mango or other fruit trees) a right is impliedly reserved to the lessor to enter and manure and water the trees, pluck the fruit &c. But the extent of the right will be measured by the necessity. Thus, in such a case the lessor could not cut down the trees which are ornamental or shady. If I give you leave to take the fish in my pond, you may cast or draw nets, but not cut down the bank to let all the water over: for though the reasonableness of this doctrine is more apparent with regard to those Easements of necessity, without which the property in its new condition cannot be enjoyed, it is also true as to all those Easements of convenience, which the owners had a common right to, and were in the habit of exercising before the severance.

§ 15. These considerations may often be of importance, upon the division of Hindu families, where an estate is separated into lots; or a house is to be enjoyed according to its divi-

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(g) William Saunders 377, and see also *Pomfret v. Ricraft*, ib. 322.

sions; in which cases such rights of way &c., must be implied as render the premises accessible; such rights to air, light and water, as have been hitherto held in common by all. The French Law is singularly illustrative of this, in what is termed "*Destination du pere de famille*." "By this," writes *Pardessus*,<sup>(h)</sup> "is understood the disposition or arrangement which the proprietor of several heritages has made for their respective use. Sometimes one heritage receives a benefit from another, without being in return subjected to an inconvenience which could amount to a species of compensation; sometimes the service is reciprocal: but these differences do not in any way change the nature or effect of this distribution. If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other, which was simple '*destination du pere de famille*, as long as the heritages belonged to the same owner, becomes a servitude as soon as they pass into the hands of the different proprietors."

And the English Law here corresponds to the French.

§ 16. When the Easement is not founded upon any express contract, but is established by evidence of long usage, it is necessary that the enjoyment of the right should have been peaceable, open, and not merely permissive. In the words of the Roman law, '*nec vi, nec clam, nec precario*.' And *Bracton* exactly corresponds with this. Lord Coke<sup>(i)</sup> has cited the passage.

"*Transferuntur dominia sine titulo et traditione, scilicet per longam, continuam, et pacificam, possessionem; longam, i. e. per spatium temporis per legem definitum; continuam dico, ita quod non sit legitime interrupta; pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa; ut si verus dominus statim, cum intrusor, vel dissecisor, ingressus fuerit seisinam, nitatur tales viri'us repellere et expellere, licet it quod inceperit perducere non possit ad effectum, dum tamen cum defecerit, diligens sit ad impetrandum et proseguendum; longus usus nec per vim, nec clam, nec precario, &c.*"

§ 17. The term *Vis* here does not here mean only actual force, but any act in opposition to a forbiddal by the owner

(h) *Traite des Servitudes*, § 228.

(i) *Co. Litt.* 113 b.

of the servient tenement whether by word or deed. *Vis* is thus explained :

*" Vi factum videri, Quintus Mucius scripsit, si quis contra quam prohiberetur, fecerit ; et mihi videtur plena esse Quinti Mucii definitio. Sed et siquis jactu vel minimi lapilli prohibitus facere, perseveravit facere, hunc quoque vi fecisse videri, Pædus et Pomponius scribunt, eoque jure utimur."*

§ 18. The *user* must be open. An enjoyment exercised by stealth, or by night, without the cognizance of the owner of the servient tenement, for however long a time usurped, will confer no right, institute no Easement. So when water in this country is abstracted from a channel, by night.

§ 19. It must be *as of right*. The term *præcario* exactly answers to permissive in the English Law.

*" Precarium est, quod precibus petenti utendum conceditur (tamdiu) quamdiu is, qui concessit, patitur."*

§ 20. We have already considered the case where the permission of the servient tenant can be shown to have been given once for all. There, the right rests upon express contract. But when the claim is founded upon *user*, the *user* must have been exercised as of right : for if the owner of the servient tenement can show that he has given permission to use the benefit as a favour, and not as a right, no presumption of the existence of any right can arise : and every renewal of the license makes the case stronger against the party claiming the right.

§ 21. Let us now consider some of the particular kinds of Easement ; and first of *water* : which in India, and especially in this Presidency, where so much of the cultivation depends upon artificial irrigation, must be of primary importance. Those indeed who know how jealously every question connected with privileges touching water—that "liquid gold" as *Arthur Cotton* has felicitously termed it—is guarded ; and how eagerly every infringement of old rights, or assertion of new, is contested in districts where the harvest is dependent on tank and channel irrigation ; will feel the full force of this statement. But irrigation works are little more than in their

infancy, so far as the English Government is concerned. Many magnificent works of the old Indian monarchs have fallen into decay : and these will no doubt be repaired. Modern science has taught the facility and the profit of biting and bridling our rivers ; and the splendid test on the Godavery, that *monumentum ære perennius* to the genius of the Engineer whose intellect conceived, and whose perseverance carried it out, must lead either public or private enterprise to similar works on our other streams. The time will come when one and all our rivers are forced to stop and deliver their wealth to the cultivator in a thousand artificial channels, ramifying and permeating through new fields of industry ; while the occupation of large tracts in the forests, and on the hill side, cannot but raise questions as to the right of water, as it leaps down from eminence to eminence, until it finds a tranquil bed upon the plains. Many a question will arise as to priority of occupancy, and the first adaptation of water to some useful purpose ; and the consideration will be complicated, according as the streams are natural or artificial, subterranean or above ground, standing or flowing, and the like. The Government, foreseeing these difficulties, has already declared that the right to all running water, not hitherto occupied, is vested in the Government of the country ; and doubtless care will be taken to reserve sufficient powers in all future grants, to enable the Government to make use of the water for the benefit of the public ; but still there will be constant questions arising before the Courts and the Collectors, as to which it is desirable that there should be certain broad principles laid down, easy of reference, and well understood.(j)

§ 22. Fortunately the principal questions as to the rights to the Easement of water have lately been so ably discussed in our Courts, with such a breadth of view and appeal to foreign Jurists and the Civil Law, that we have the plainest guides before us ; and as it would be hopeless to seek to condense where all omission must only damage the arguments, it remains

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(j) See Act I of 1858. And as to the provisions respecting the use of water in the Presidency Towns, see Act XIV of 1856.

for us to give *in extenso* the most important parts of these luminous judgments. And amply will their perusal repay the reader. The subject has already been in part touched upon in the Thirteenth Topic; and it was a sense of the importance of this Easement that there led me to give so much space to the judgments in *Mason v. Hill*, *Embrey v. Owen*, and *Chasemore v. Richards*.

§ 23. Running water is the subject of several Easements: first, the right to receive and transmit it in its accustomed course, which may be called a *natural* Easement; second, the right to interfere with its accustomed course, either by penning it back upon the land above, or transmitting it altered in quantity or quality; and this may be called an artificial Easement.

§ 24. On the first of these rights, a negative right, of non-interference—that of having the water flow in its accustomed course without let or hindrances, we have the judgment of *Mr. J. Story*, in an American case,<sup>(k)</sup> in which the subject is excellently well considered. “*Prima facie*” he says “every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream; or, as it is commonly expressed *ad medium filum aquæ*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine,

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(k) *Taylor v. Wilkinson*. 4 Mas. S. R. 397.

that there can be no diminution whatsoever and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors, or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good and is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *sic utere tuo at alienum non ledas*.

“But of a thing common by nature, there may be an appropriation by general consent, or grant. Mere priority of occupation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land: and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law. Now this may be either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say, of a grant or right—for I very much doubt whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant—is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever by possibility, a right may be acquired in any manner known to the law.

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“With these two principles in view, the general rights of the plaintiffs cannot admit of much controversy, they are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution of their injury. As owners of the lower dam, and the mills con-

nected therewith, they had no rights beyond those of any other persons; who might have appropriated that portion of the stream to the use of their mills; that is, their rights are to be measured by the extent of their natural appropriation, and use of the water for a period, which the law deem a conclusive presumption in favour of rights of this nature. In their character as mill owners, they have no title to the flow of the stream beyond the water actually and legally appropriated by the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, as far as it has not been already acquired by some prior and legally operative appropriation.

"No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent of the parties, who seek to narrow those rights, to establish, by competent proofs, their own title to divert and use the stream."

§ 25. And Chancellor *Kent* in his Commentaries<sup>(d)</sup> writes,

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution, or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself but a simple use for it while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he can divert or diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it.

"This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application.

"The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every

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(d) 3 Kent's Com. 439.



riparian proprietor from the application of the water to domestic agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury and the manner of using the water.

“All that the law requires of the party, by and over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water by the proprietors below on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. *Pothier* lays down the rule very strictly, ‘that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below.’ But this must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become entirely useless, either for manufacturing or agricultural purposes. The just and equitable principle as given in the Roman law :—‘*Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.*’”

§ 26. It has been thought that mere occupancy is sufficient to entitle a man to this Easement. Thus, if a river flowed through the adjoining lands of three riparian proprietors, it was thought that he who first turned the water to a beneficial purpose would have a right, by virtue of his priority of appropriation, to continue his diversion, no matter how injurious to those below or above him; notwithstanding their occupation of the lands adjacent to the river was simultaneous, or if not simultaneous, at least prior to such diversion: so that those below had acquired a right to have the water flow on in its accustomed channel. If the appropriation of water had taken place before the lower lands were occupied, as in waste jungle lands, in India, no question could arise; for then those coming to the stream must take it as they found it. But the case arises where adjacent

riparian proprietors along the course of the stream have acquired each a right to have the water flow in its ordinary channel, and then *one* of them by appropriation interferes with such right.

“The material question, therefore,” writes *Gale*<sup>(m)</sup> “is, what is such a beneficial enjoyment as to vest this right; whether the simple fact of the water running in an ancient channel to and through land is sufficient to confer upon the owner of it this right to prevent his neighbour’s interference; or whether there must be some more direct and tangible perception of the benefit of the water; and if so whether a single act of such perception is sufficient; or whether such perception of benefit must be continued and repeated during such a period of time as would be requisite in general to confer on easement. Upon this latter branch of the question another point arises,—whether the act, or acts, of perception give a right to claim the benefit of the entire stream, or to such an extent only as may be sufficient to continue the enjoyment already had. Thus, for instance, if a stream runs through the lands of two neighbouring proprietors, does that, *per se*, give the right to the owner of the lower land to have the stream flow on without interruption, and, consequently, to maintain an action against the proprietor above for any diversion of the water by him; or is it necessary that he must previously have used the water, as by means of a mill, or in some similar manner; and if so, must such usage have subsisted for the time required to give an easement: and further, if such mill requires only one half the usual supply of water of the stream, can he maintain an action for any diversion of the stream so long as sufficient water is left to turn his mill.

“The authorities seem now clearly to have settled, that, if the stream be of sufficient antiquity, a single act of perception of the benefit of it is enough to give a right to the owner of the land to insist upon the stream running on in its accustomed course; at all events, to such an extent as may be necessary for the continuance of such enjoyment.

“As it cannot be denied that the right to have water run on in its accustomed course depends, in the absence of any express stipulation, upon antiquity of enjoyment, it follows, that a recent act of perception of the benefit of the stream cannot in itself be sufficient to confer the Easement; nor is it easy to see how the single act of perception can give such additional force to the evidence of the antiquity of the stream,

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(m) On Easements, p. 136.

as to make it afford a presumption of an Easement, supposing the mere antiquity of the stream, unaccompanied by proof of user, could not give rise to such a presumption.

"This would seem to show that the right to the flow of water is quite independent of any such act of perception; but applying the well-known rule of law, that an action on the case cannot be maintained for a tortious act, unless the plaintiff shows some actual damage resulting from such act to himself, there is authority to the effect, that it is incumbent on the party complaining of the diversion of a stream, to show that he has sustained some damage thereby; he must show that he has already applied the stream to some useful purpose, with which the diversion interferes.

"Even supposing, however, this to be law, it is clear that every proprietor of land along the stream has, as soon as he has applied the water to a beneficial purpose, a right to maintain an action against any person who diverts it, unless the person so diverting it has acquired a legal title to do so; and that such action may be maintained for continuing the diversion, although it originally took place before any such beneficial application was made; as, for instance, if a party erects a mill, and thereby interferes with the course of a stream, he is liable to an action for such diversion at the suit of any proprietor of land lying lower down the stream, although the latter has applied the water to a beneficial purpose only one day before the time requisite to give the owner of the mill a prescriptive right to the water."

§ 27. "The right to the use of water," said Sir John Leach, in *Wright v. Howard*<sup>(n)</sup> "rests upon clear and settled principles; *primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors effected by his operations, or

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(n) 1 Sim, and S. 190.

must prove an uninterrupted enjoyment of twenty years." The learned judge then added "that an action will lie at any time within twenty years where injury happens to arise in consequence of the new purpose of the party to avail himself of his common right."

§ 28. The case of *Mason v. Hill*<sup>(o)</sup> is however now the leading authority upon this question. That case came twice before the Court of King's Bench, and on both occasions elaborate judgments were pronounced, both fully sanctioning the principle, that if the owner of land adjoining a stream has once appropriated the water to a beneficial purpose, he may maintain an action against any person diverting it from its usual course, though such diversion be the continuation of an act done previous to that beneficial appropriation on his part, provided such diversion has not continued for a sufficient length of time to confer an Easement.

Mr. Gale gives the following abstract of the case.

"The declaration stated, 'that the plaintiff was lawfully possessed of a small manufactory and premises, and by reason thereof ought to have had and enjoyed the benefit and advantage of the water of a certain stream, which had been used to run and flow, and of right ought still to run and flow, to his mill, &c. in great purity and plenty, to supply the same with water for working, using and enjoying the same, and for other necessary purposes; that the defendants, by a certain dam and obstructions across the stream above the plaintiff's premises, impounded, penned back, and stopped the water, and by pipes, stiles, &c., diverted it from the plaintiff's premises, and prevented it from flowing along the usual and proper course; and further, that the defendants injuriously heated, corrupted, and spoiled the water, so that it became of no use to the plaintiff, whereby he was prevented from using his mill and premises in so extensive and beneficial a manner as he otherwise would have done.' At the trial before *Bosanquet*, J., the following appeared to be the facts of the case. 'The plaintiff and the defendants had land contiguous to the stream; the land of the defendants being situate on a part of the stream above the land of the plaintiff. The stream acted as a sewer to part of the town of Newcastle-under-Lyne, and the water was consequently foul and muddy; it had been unprofitable to both parties until it was diverted

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(o) 3 B. & Ad. 304; 5 B. & Ad. 1. Ante p. 155.

by the defendants : this diversion took place in 1818, by the defendants erecting a weir or dam across the stream at the part contiguous to their own land. By means of this weir, and of channels and reservoirs made in their land, great part of the water was conveyed to certain buildings belonging to them at some distance from the weir, and there used as part of the supply of water necessary for a steam engine. About ten years after this diversion, the plaintiff made a channel in his land contiguous to the stream, for conveying the water to some buildings belonging to him at a little distance from the stream, for the purpose of some process of manufacture not previously carried on there. Some attempts at accommodation between the parties took place, but were ineffectual or unsatisfactory, and therefore the action was brought : the plaintiff's works were occasionally suspended for want of the water diverted by the defendants, and which, after it had been used by them, was suffered to pass away into a level below the plaintiff's works.

" It was contended on the part of the defendants, that as they had first appropriated the use of the water in the sewer to beneficial purposes without injuring the plaintiff, they had acquired a right thereto, and were not answerable for the diversion ; and *Williams v. Morland* was cited. The learned judge acting upon that authority directed the jury to find a verdict for the defendants.

" In the ensuing term a rule was obtained for a new trial, on the ground that the defendants, who had diverted the water, could acquire no right to have it flow in its new channel by mere appropriation without twenty years' unmolested enjoyment. Cause having been shown against the rule, the Court took time to consider their judgment, which was afterwards declared by Lord Denman."

The judgment may be consulted in page 145 of this work.

§ 29. And as the occupant of the water of the stream cannot obtain any right to continue his interruption of the natural flow under a period of twenty years, the riparian possessor below him can bring his action, it would seem, for the interruption at any time within the twenty years, even though he himself have done no act to appropriate the water. On the one hand, it may be argued, that unless he wanted the water himself for some beneficial purpose, the interruption would be *damnum sine injuria* ; but it appears to be considered an injury to the right ; and the American Courts have expressly ruled,

that no such act of appropriation is necessary. In *Blanchard v. Baker*,<sup>(p)</sup> the Court said,

“A mill privilege, not yet occupied, is valuable for the purpose to which it may be applied. It is a property which no one can have a legal right to impair or destroy, by diverting from it the natural flow of the stream upon which its value depends; although it may be impaired by the exercise of certain lawful rights originating in prior occupancy. If an unlawful diversion is suffered for twenty years, it ripens into a right, which cannot be controverted. If the party injured cannot be allowed in the meantime to vindicate his right by action it would depend upon the will of others, whether should be permitted or not to enjoy that species of property.”

§ 30. Having considered the *natural* Easement, the negative right to have water flow in its ordinary channel, we come next to the *artificial* Easement; Easements of an affirmative character, such as the right to throw back the water upon the land above, or to prevent or diminish its flow to the land below; or to pass it on altered in quality, as for instance heated from being applied to steam mills, or noxious from the precipitation of mineral, or the admixture of chemical substances.

So in *Beetson v. Weale*,<sup>(q)</sup> where an artificial cut from a brook began at point A in defendant's close, and passed through another close of defendant to point C, and thence back into the brook. Defendant and the previous occupiers of his farm had been in the habit of turning the water of the brook down the artificial cut at A for the purpose of irrigating the latter close. Plaintiff occupied a close, called “The Cow Pasture,” near this latter close, and as far back as living memory went he and the previous occupiers of the Cow Pasture had habitually, when their cattle were depasturing there, gone upon defendant's land and diverted the water from the brook by putting a dam at A, which caused it to flow down the artificial cut, and by putting another obstruction at C, turned it so as to flow into a watering-place for cattle in the Cow Pasture. In an action by plaintiff, alleging a right to the use of

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(p) 8 Greenleaf's Reports.

(q) 20 Jur. p. 540.

part of the water of the brook flowing along the artificial cut—Held, that there was evidence to support the right; that the use of the water by defendant on the servient tenement did not take away from the effect of the use of it by plaintiff for the dominant tenement; and that the purpose of irrigation, for which the cut was made, was not a mere temporary purpose.

Lord *Campbell*, C. J. in delivering judgment said,

“The defendant’s counsel, in arguing that the plaintiff ought to have been nonsuited, relied mainly on *Arkright v. Gell*,<sup>(r)</sup> *Wood v. Wand*,<sup>(s)</sup> and *Greatrex v. Hayward*.<sup>(t)</sup> We entirely concur in these decisions, thinking that the plaintiff did not in any of them support his allegation as to the easement claimed. In none of them was there any reasonable ground for inferring that the easement had been acquired by prescription or grant. But we do not consider that these cases lay down any such rule as that enjoyment and acts, which without the existence of the easement would be tortious and actionable, may not be evidence of the right to the use of water, although it flows in an artificial cut. This doctrine would destroy the right to the great majority of mill-leads all over the kingdom, for the water invariably runs through them in an artificial cut, from the weir across the natural current of the river, where they begin, till the water is restored to the natural current of the river; and it very frequently happens that in parts the soil belongs not to the owner of the mill, but to a stranger. Nevertheless, if the water has flowed immemorially, or for a considerable period of time, from the river, through the lead, to turn the mill, and the owner of the mill has been in the habit of going on the soil of another to clean out the lead and to repair its banks, we conceive that the right to do so might be established, and that an obstruction to the flow of water through the mill-lead would be actionable.

“In the cases referred to regard was had to the water being obtained artificially by the owner of the servient tenements, rather than to the water running through an artificial cut. Here the water in question is part of the water of a stream which has flowed on the surface of the country from the time that our globe took its present conformation. But the strength of the plaintiff’s case (distinguishing it from the cases relied upon by the defendant) is, that here the occupier of the dominant tenement, for the purpose of letting in the water from the natural current of the river into the artificial cut, and from the artifi

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(r) 5 M. & W. 203.

(s) 3 Exch. 748.

(t) 8 Exch. 291.

cial cut into his pond in the Cow Pasture, was constantly going upon the servient tenement, with notice to the occupier of the servient tenement, and doing acts which, without the easement, would be trespasses. Such has been the practice as far back as living memory goes, and may have been the practice from time immemorial. Yet for these acts no action has been brought, nor has any complaint been made. If you are to presume that they took place by the license of the occupier of the servient tenement, then by constant user acquiesced in no easement can be acquired. But if it were not that the occupier of the servient tenement has himself used the water flowing through the artificial cut for irrigation, no plausible objection could be made to the easement which the plaintiff claims; and we do not see that the use of the water on the servient tenement takes away from the effect of the use of it for the dominant tenement, regard being had to the positive acts done by the occupier of the dominant tenement upon the servient tenement for the purpose of enjoying the easement.

“Great stress was laid by the defendant’s counsel on the often-repeated assertion, that the artificial cut was made for a temporary purpose. The water flowing through the cut has, as far back as living memory goes, and probably much longer, been constantly applied to two purposes—the irrigation of the meadow on one side of the cut, and the watering of the cattle pasturing on the meadow on the other side of the cut. These purposes cannot be considered temporary in their nature, although there is no certainty that the meadows may not at some remote time become the sites of streets or squares in a town.”

§ 31. The long continued permission of the owner of the servient tenement to the owner of the dominant tenement, to discharge water through an artificial channel, or to receive a supply through the servient owner’s land, has been decided in the case of *Major v. Chadwick*.<sup>(u)</sup> There the plaintiff’s complained of the pollution of a stream running to their brewery. The defendants traversed the plaintiff’s right to the stream. It appeared that the stream or water course claimed by the plaintiffs flowed from the mouth of an adit, or underground passage, in adjoining lands not belonging to the plaintiffs, and which had been originally made, upwards of fifty years ago, for the purpose of clearing the water from a certain mine, by the owner of the mine, but that the mine had not

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(u) 11. A and E. 571.



been worked for more than thirty years past; that, after the working was discontinued, the plaintiffs availed themselves of the water coming along this channel to brew beer, and, after clearing the adit themselves, had for more than twenty years obtained from it pure water for that purpose, and had erected a brewery there at a great expense. It was admitted, that, at the time when the adit was originally made and the mine worked, the water must have been unfit for the uses to which the plaintiffs now applied it. The defendants were owners of other mines (copper mines) and had lately used the old adit for the purpose of draining them, by which the water had again been made foul and unfit for brewing. It was not shown that they were connected with, or claimed under, the owners of the adit or mine, or of the lands through which it flowed. The Judge told the Jury that, in the absence of custom, artificial water-courses are not distinguished in law from such as are natural; that the same rules apply to them; and that twenty years enjoyment might therefore warrant the Jury in finding in favour of the right. The Jury found a verdict for the plaintiffs. A rule *nisi* for a new trial was granted. Lord Denman said,

“On the argument for a new trial, the defendants took other ground. They said that the artificial nature of the adit, and the known practice of all the mineral districts, were strong evidence even in the absence of a custom, to show that the plaintiff's enjoyment was not of right; because they must have known that the owner of the mine had made the water-course for his own convenience, and had ceased to work it with the intention of resuming that work whenever it suited his interest, and with all the rights of throwing in dirt and rubbish which usually attend these operations. And great stress was laid on the recent decision in the Exchequer of *Arkwright v. Gell*, where the Court, placed by consent in the situation of a Jury, declined to draw the inference of an exercise by right, because, they thought the circumstances would not have warranted the presumption of a grant. So, it was said, the universal mode of proceeding in the mining district would have been material to show that the plaintiff's used the water with no idea of having a right to it, but were merely taking advantage of the accidental non-user of the adit for such time as it happened to be useful to them. We are by no means prepared to say that the circumstances under which a water-course has been enjoyed may not prove it to have been without right; or that a universal

practice in the neighbourhood might not lead to fix the party with knowledge that those who cleared a mine by an adit notoriously reserved to themselves the right of working the mine at any time. But this view was never pressed on the learned Judge on the trial, the defendants relying on proof of their custom, and electing to stand or fall by the opinion which the jury might form upon it. The point was properly raised; and the complaint is not even that the verdict was wrong on the evidence put forward, but merely that the defendants themselves did not rest their case on such strong facts as they might. The imputed misdirection is, that the law of water-courses is the same whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition that a water-course, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to us quite indispensable. And the late case in the Exchequer leads to no such conclusion."

§ 32. But put the case of the servient owner attempting to compel the dominant owner to continue his discharge, and thus seek to invert their positions. It would seem that the right could not be sustained. In the case of *Arkwright v. Gell*<sup>(v)</sup> the Court decided that the parties receiving water drained from a mine, could not compel the owners of the mine to continue the discharge. There Lord *Abinger* said,

"The Plaintiffs in this case, are the occupiers of certain cotton mills, at Cromford, in the county of Derby, and complain of an illegal diversion, by the defendants of the water to which they were of right entitled for the supply of their mills. The defendants by their pleas deny that right, and also insist that they have not been guilty of any illegal diversion. A special case was reserved on the trial, for the opinion of the Court, stating a great number of documents and facts, upon which the Court are not merely to give their judgment on matters of law, but to take the office of the jury, by determining whether any and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law with an inference of fact only, which inference might have been varied by a very slight circumstance.

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(v) 5 M. and W. 203.

"From the facts and documents, however, the case appears to be this :—In the beginning of the last century, certain adventurers had in part constructed, and were proceeding to continue a sough, now called the Cromford sough, for the purpose of draining a portion of the mineral field in the wapentake of Wirksworth. How they acquired the right to make that sough is not stated ; it was, however, without doubt, either by virtue of the custom of mining there prevalent, or by the express license of the owner of the soil through which it was made. The adventurers received their remuneration in the shape of a certain portion of the ore raised from the mines within the level lying near and benefited by the sough (technically called, within the title of the sough,) in consequence of an agreement with the proprietors of the mines. The right to this Easement, with its accompanying advantages, appears to have been the subject of sale and conveyance in that district ; for in 1738 the proprietors leased it for 999 years for a pecuniary consideration, with a reservation by way of rent of a part of the profits. Mr. *Arkwright* under whom the plaintiff's claim, and all whose rights they may be assumed to have had, by demise from him, when the cause of action accrued, became, in 1836, the purchaser of the reversion expectant on the determination of that lease, and he also acquired a portion of the interest of the lessees by a conveyance from some of them. It does not appear to us that this circumstance affects the question between the parties to this suit.

"After the sough had been constructed, and a constant flow of water thereby conducted from the mines, the late Sir *Richard Arkwright*, the father of Mr. *Arkwright*, obtained, in the year 1771, a lease for eighty-four years, from the lord of the manor of Cromford, (who, upon the special case, is alleged to have been the owner of the land through which the Cromford Sough was made, and also the owner of a piece of land between the mouth of the sough and the brook into which the water was conveyed,) of that piece of land, the brook and the 'stream of water issuing and coming from Cromford Sough,' with the right of erecting mills on the piece of land. In 1772, Sir *Richard Arkwright* erected extensive cotton mills thereon, and in April, 1789, he purchased that land and the fee-simple in the mills and the manor of Cromford, including the lands through which the Cromford Sough was made.

"In the meantime, another company of adventurers had begun to construct another mining sough, called the Meerbrook Sough, on a much lower level in the adjoining township of Wirksworth. The defendants represent and have all the rights of that company of adventurers, and must, like the proprietors of the Cromford Sough, be assumed to have acted,

either by virtue of a mining custom or by express license of the owner of the soil, confirmed by the Cromford inclosure Act in 1802, and also to have had the authority, prior or subsequent, of the owners of the mines drained by that sough, and contributing a certain portion of the ore by way of recompense. These facts are not distinctly found, but we think we must infer that such was the case, and consequently that the defendants stand in the same relation to the plaintiffs as if the owners of those mines had themselves with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they make the sough themselves, or through the Agency of the adventurers, is immaterial. In 1813 the defendants, being themselves proprietors of mines drained by it, extended the Meerbrook Sough, having made an agreement with the then proprietors of the Cromford Sough, and of other mines unwatered by it, and which appeared to have been then worked down to the level of that sough, for the purpose of regulating their respective rights, and the recompense to be paid by the latter to the former set of adventurers for the benefit to be derived by them by the extension of this sough, and the unwatering by means of it of a further portion of their mineral field below the level of the former sough.

“The new sough was, therefore, constructed by the consent of some, if not all of those mine owners who had formerly used the Cromford Sough, and in part for their benefit; and this circumstance places the defendants in the same position in respect to the diversion of the surplus water, as if they themselves had been owners of part of the mineral field formerly drained by the Cromford Sough, and were now proceeding to unwater a further portion of the same field by means of the new sough. When the Meerbrook Sough was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened let off the water which would otherwise have been discharged by the Cromford Sough, and thereby prevented it from flowing to the plaintiff's mill.

“In 1825 an arrangement was made for the mutual accommodation of Mr. *Arkwright* and the Meerbrook Sough proprietors, which was not to affect their rights, and which, having been determined in 1836, left them in the same situation as if it had never been made; and the gates being removed, in order to carry the sough further in that direction, and the water thereby diverted from the plaintiff's mills, the defendants are in the same situation as if no flood-gates had been made, and as if in

the construction of their sough for the purpose of draining another portion of the mineral field, they had broken the natural barrier which pent the water up and made it flow through the Cromford Sough, and so caused the water to pass out at a lower level through the Meerbrook Sough, and the question is—whether the defendants by so doing are rendered liable to an action at the suit of the plaintiffs. This question, which was most elaborately and ably argued during the last term, appears to us, strictly speaking, to be one as much of fact as of law; and when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty.

“The stream upon which the mills were constructed was not a natural water-course, to the advantage of which flowing in its natural course the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill* and in other cases; this was an artificial water-course, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted.

“That Sir *Richard Arkwright* contemplated the discontinuance of this water-course, (if the question of his knowledge in this state of things can be material,) there is evidence in the Case made in 1771, which contains a provision for a supply from the river, in the event of the stream being lessened or taken away by the construction of another sough: and also, that such an event was not improbable, appears from the clause in the 2nd Cromford Canal Act, 30 Geo. 3, c. 56, s. 4. What, then, is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a water-course at common law, and independently of the effect of user, under the recent statute 2 & 3 Will. 4. c. 71? He would only have a right to use it for any purpose to which it was applicable so long as it continued there. An user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity, for such a grant would, in truth, be neither more or less than an obligation on the mine-owner not to work his mines, by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the

flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely—a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights—to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity, as a matter of right.

“Several instances were put in the course of the argument of cases analogous to the present, in which it could not be contended, for a moment, that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining land-owner, and is there used for agricultural purposes for twenty years. Is it possible from the fact of such a user to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen himself and the assigns of his mine with the obligation to keep a steam-engine for ever, for the benefit of the land-owner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended, that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not: in all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water take its origin; though, as between the first and any subsequent appropriator of the water-course itself, such a right may be acquired. And so, in the present case, Sir *Richard Arkwright*, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him; and if there had been no grant he would, by twenty years’ user, have acquired the like right as against such owner; but the user even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

“It remains to be considered whether the statute 2 & 3 Will. 4

C. 71, gives to Mr. *Arkwright*, and those who claim under him, any such right, and we are clearly of opinion that it does not. The whole purview of the act shows that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods without interruption, and therefore necessarily imports such an user as could be interrupted by some one capable of resisting the claim; and it also requires it to be of right. But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode; and as against them it was not of right; they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it.

"We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel either by the presumption of a grant, or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority, and therefore our judgment must be for the defendants."

§ 33. On the subject of rights to subterranean water the case of *Acton v. Blundell*<sup>(w)</sup> is the leading case. There it was decided that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a land-owner who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry, *Tindal*, C. J. said as follows:—

"The plaintiff below, who is also the plaintiff in error, in his action on the case, declared in the first count for the disturbance of his right to the water of certain underground springs, streams and watercourses, which, as he alleged, ought of right to run, flow and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain spring or well of water in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the

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(w) 12 M. and W. 324.

use, benefit and enjoyment of the water of the said spring or well for the convenient use of his close. The defendants by their pleas traversed the rights in the manner alleged in those counts respectively. At the trial the plaintiff proved, that, within twenty years before the commencement of the suit, viz. in the latter end of 1821 a former and owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that, by the first, the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause was tried directed the jury, that, if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and third pleas. Against this direction of the judge the counsel for the plaintiff tendered the bill of exceptions which has been argued before us. And after hearing such argument, and consideration of the case, we are of opinion that the direction of the learned judge was correct in point of law.

“The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a water-course flowing on the surface.

“The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King's Bench in the case of *Mason v. Hill*, and substantially is declared by the Vice-Chancellor in the case of *Wright v. Howard*, and such we consider a correct exposition of the law. And if the right to the enjoy-



ment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

"But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

"The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which could seem to be the opinion of Fleta and of Blackstone, the origin of which is lost by the progress of time; or it may not be unfitly treated as laid down by Mr. Justice *Story*, in his judgment in the case of *Tyler v. Wilkinson*, in the Courts of the United States, as 'an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law.' But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of

the well, there can be ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

“ But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbour as he sends down to his neighbour below: he is neither better nor worse: the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purpose of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined; in the present case, the nearest coal-pit is at the distance of half a mile from the well, it is obvious the law must equally apply if there is an interval of many miles.

“ Considering, thereof, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

"No case has been cited on either side bearing directly on the subject in dispute. The case of *Cooper v. Barber*, which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but as this percolation had been insensible, and unknown by the plaintiff until the land was applied for building purposes, the Court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott* is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of Easement, for support or otherwise, over the adjoining land of his neighbour. It is said in that case, 'he has no right to load his own soil, so as to make it require the support of that of his neighbour, unless he has some grant to that effect.' It must follow, by parity of reason that, if he digs a well in his own land so close to the soil of his neighbour, as to require the support of a rib of clay or of stone in his neighbour's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary; which is, in substance, the very case before us.

"The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the ground work of the municipal law of most of the countries in Europe.

"The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity. In the Digest. lib. 39, tit. 3, *De aquâ et aquæ pluvie arcandæ*, s. 12, '*Denique Marcellus scribit, cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sanè non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.*'

"It is scarcely necessary to say, that we intimate no opinion whatever

as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.

"We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the court below must be affirmed. Judgment affirmed."

§ 34. The rights of riparian possessors of lakes or tanks have lately been considered. The leading case is that of *Menzies v. Macdonald*.<sup>(x)</sup>

Where two persons are joint owners of a lake, with a common right of sailing, fishing, floating timber, &c., such right is held to be not indivisible, and that either of such persons may alien the whole or any portion of his right, even where it was merely appurtenant to the land, provided that such alienation does not deprive the co-owner of the full enjoyment of his moiety; and a co-owner may maintain an action for the regulation of his enjoyment, as he could if there had been no alienation.

§ 35. The right of free access of wind to a wind-mill was considered in the recent case of *Webb v. Bird*.<sup>(y)</sup> There *Erle*, C. J. said,

"This is a case of novelty so far as the decisions to be found in the books go; but on the whole, my opinion is, that the defendants are entitled to succeed. The claim is made by the plaintiff, to enforce

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(x) 20 Jur. p. 575.

(y) 9. W. R. p. 899.

on the defendants a servitude of allowing wind to pass to his windmill, they having built a school-house twenty yards distant. Now, there are three ways by which a servitude can be acquired—that is to say, by prescription, by grant, or by statute. Now, in the present case, the plaintiff cannot rely on prescription, nor on grant. He must, therefore, rely on the statute, if he can succeed. The 2nd section of the Prescription Act enacts, ‘That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over, or from any land or water of, &c., when such way or other matter as herein last before mentioned, shall have been actually enjoyed by any person claiming right thereto, without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years,’ &c. The question, then is whether this claim is within that section. It appears to me that that section is not intended to apply to every sort of enjoyment which goes by the name of easement, but to apply only to those easements which can be ‘enjoyed or derived upon, over, or from any land,’ &c. Here the claim is for wind to the plaintiff’s mill; and it appears to me that the Legislature in framing the section never intended to include such a right as is here claimed. I am at a loss to say what could be an interruption of access of wind to a windmill, which turns necessarily to every point of the compass. It is not like the interruption of a way, or that of lights; the former of which may be effected by a gate, and the latter by boards. The statute means easements upon the surface of land capable of being interrupted. I am strengthened in this view by the 3rd section of the statute, which says, ‘that when the access and use of light to and for any dwelling-house, &c., shall have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible,’ &c. It is clear that the Legislature thought the passage of light different from the other easements, therefore they provided for it, by a separate section. There is a strong analogy between light and air, and wind is air. If the Legislature had intended the statute should extend to wind, they would have specially provided for it, as they have done in the case of light; and as they have not done so, the right here claimed cannot be maintained. There are no cases for centuries back in which such a claim has been made, and that alone is a strong inference against the ground of this action. It is true that there are two old cases mentioned in Rolle’s Abridgment, which might lend some countenance to such a claim; but they are very short and insufficient

notes. No particulars are given by which it can be seen on what ground the decisions were given. It may be that they were claims by prescription; or, that the owners of the mills owed suit and service. There is no authority for this claim, and analogy is against it. I think the establishing of such a right in the owner of a windmill would be a most formidable prohibition on the owners of surrounding properties, especially so in large towns where land is valuable; then, if a man might not build within a radius of twenty-five yards, most serious injury might be inflicted. For these reasons I am of opinion that the defendants are entitled to judgment."

§ 36. The right to the enjoyment of light and air inherent in property seems to be limited to that which falls *perpendicularly* upon the land. *Cujus est solum, ejus est usque ad cælum et ad inferos*. The right to enjoy light and air in a *lateral* direction is an Easement. Where light and air have been received for twenty years through a window, it is an "ancient window," and the owner of the adjoining premises cannot diminish the amount received.

§ 37. But the right does not extend to an Easement of *prospect*; and therefore in *Atty. General v. Doughty*,<sup>(2)</sup> Lord *Hardwick* refused to restrain the defendants from proceeding with certain buildings which would interfere with the prospect from Gray's Inn Gardens.

§ 38. Nor will an alteration in the character of the dominant tenement give the possessor a right to increased light. Thus when a building, long used as a malt-house, was converted into a dwelling, *Macdonald*, C. B. said,

"It was not enough that the windows were, to a certain degree, darkened by the wall which the defendant had erected on his own ground, the house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house; the converting it from the one into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his own, suddenly impose a new restriction on his neighbour. This house had for twenty years enjoyed light sufficient for a malt-house, and up to this extent, and no further, the plaintiff's could still require that light should be admitted to it;

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(2) 2 Ves. Sr. 452.

the question, therefore, was, whether, if it still remained in the condition of a malt-house, a proper degree of light, for the purpose of making malt was now prevented from entering it by reason of the wall which the defendant had erected."

So in the recent case of *Cooper v. Hubbuck*,<sup>(a)</sup> it was held that a person who has the right to light and air over the land of another cannot alter the size or position of his windows so as *materially* to prejudice the neighbouring owner over whose land he has the easement. And Sir John Romilly, M. R., said,

"The principle upon which they all proceed appears to be this:—A person opens a window, letting in light and air, over the land of his neighbour; and after an uninterrupted enjoyment for twenty years he acquires an absolute right to that easement over his neighbour's land; and, as in the case of a footpath or carriage-road, the law presumes a grant of the easement. But the easement which he has thus acquired cannot be enlarged by any act of his; it is limited, in the case of a footpath, to a footpath, and he cannot turn it into a carriage-road; and in the case of a window or right of light, the easement must be confined, substantially, to that which he has already got; he cannot afterwards make it a much larger and more important right. For instance, if a man opens a window, and obtains a right to light and air through that window over his neighbour's land, he cannot by reason of such easement open another window ten feet distant, and claim an easement in respect of that window also; and accordingly what appears to me to be the principle of all the cases referred to by the Lord Chief Justice in *Renshaw v. Bean* is this, to use the words of the Chief Justice, 'whether the alteration is material or not.' It is very important to observe—and upon this I wish particularly to state what my view is—what is meant by the word 'material.' No doubt every alteration is 'material' to the person who makes it, otherwise he would not make it; but, as I understand it, the question is, whether the alteration is material to the person over whose land the easement is; that is, whether he is prejudiced—whether the enjoyment of his property is to any extent diminished by reason of the alteration made in the lights. For it is quite clear that an alteration may be made without 'materially' prejudicing the person over whose property the easement is.

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(a) 7 Jur. n. s. p. 457.

Suppose a man has four windows, all close to one another, looking over another man's land, and in the centre, between these four, he opens another window, it is difficult to see in what way that could prejudice the persons over whose land it looks; and if any wrong whatever is done, it is, to use an expression which is sometimes made use of in the books, a '*damnum absque injuriâ*.' Accordingly in all these cases I should consider whether, in fact, the land over which the easement is enjoyed is in any degree prejudicially affected by the alteration. So regarding it in this case, I am of opinion that no material damage is done by the alteration in the position of the windows, and that the rights of the owner of the adjoining land are not one jot prejudicially affected thereby. With respect to the addition of the upper story, the question arises which was raised in *Renshaw v. Bean*, and on that two points arise—first, whether the defendant had any right to build the upper story at all, by reason of there having been formerly a story with dormer windows; or, secondly, if he had no such right, whether the owner of the adjoining land could not stop up those windows. Suppose this case:—A person opens four windows, two on each story, in a wall looking over the land of his neighbour, and then he opens two windows higher up. The owner of the adjoining land is entitled to stop these windows; but how can he do so? He cannot stop the other four windows; he must erect something for the purpose of stopping the last two windows, without interrupting the right acquired to the other four; and that, in my opinion, is the limit of his rights, and the limit of what he is entitled to. With respect to the case of *Wilson v. Townsend*, that case is very materially affected by the circumstance that the order was made upon an interlocutory application, and not upon the hearing of the cause. If that case had come before me upon the hearing of the cause, and I was of opinion, acting as a jury, that the alteration had materially affected the interest of the adjoining owner, I should not on that account have refused the injunction simpliciter, but I should have adopted this course—I should have said to the plaintiff, 'Will you submit to an order compelling you to restore the property to what it was previously? If so, I will make an order accordingly, and thereupon direct an injunction to prevent the old lights, which you are entitled to, from being obscured, or the air cut off from entering your premises by those apertures.' That, I apprehend, would be fully in accordance with *Renshaw v. Bean*; in fact, it would be following that decision, which says, 'If you restore the windows to the state in which they were before, when they are in that restored condition you are entitled to the light and air which you previously



had.' Accordingly, if I thought that the alteration made by the plaintiffs materially affected the lights of the defendant, I should, the plaintiffs submitting to it, have made an order which the defendant could have enforced, and not a mere undertaking, for restoring the windows to their original situation, and have granted an injunction in a mandatory form, restraining the defendant from permitting the light and air to be interrupted which formerly came to those windows." (b)

And in *Davis v. Marshall*(c) where the owner of ancient lights puts in new lights, the owner of the adjoining land has a right to obstruct the new lights, and, if it is necessary for that purpose, even to obstruct the old lights.

And Sir R. T. *Kindersley*, V. C. said,

"It appears to me that it is a perfectly sound and well-established principle, that if a party has ancient lights, which he is entitled to have protected against being blocked up, or against the light from them being impeded in any way by a neighbour, who has property immediately contiguous—if that party, having those ancient lights, puts new lights into his building on the same side of the building, he has, of course, no right to treat those new lights as ancient lights, or to have any protection, upon the footing of ancient lights, in respect of them; and a party who has contiguous land has the right to build up any building which will have the effect of blocking the light from those new lights, even though, in the so doing, he necessarily interferes with the light coming through the ancient lights; and that for the best of all reasons, because, if it were not so, if he were not entitled to do that, the party making those new lights would, in the lapse of a certain number of years, have acquired a right, which he never possessed before, to treat these new lights as ancient lights. The party against whom the easement, if I may call it so, is insisted on, has a right to say that, at all events, no new easement shall be acquired against him."

§ 39. Rights of Way are of various kinds. They are necessarily intermittent; since no one can be at all times on the road. They may be limited to particular kinds of passage: as carriage-ways, horse-ways, foot passenger ways, cattle tracts.\*

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(b) See 1. H & N. 916. 7. Jur. 926. (c) 7 Jur. n. s. p. 720.

\* The Roman Law recognized the *Iter*, or foot-way; *actus*, or foot and horse way: *via* or *aditus*, or carriage way, including the other two.

They may be for particular qualities of goods, as for coals, or all articles but coals. They may be limited to particular seasons or occasions; as to cross fields after crops are cut; or to go to church, or market, on particular days. Though the rule *omne majus content in se minus* is not inapplicable, and a carriage way may include a horse or foot passenger way, as the *via* or *aditus* of the Romans, and our own high-way; yet it will be for the judge to determine in each case the *extent* of the particular rights; for though a man may be presumed to have permitted or granted a right of way to one class, it by no means follows that this includes any other. Thus, a right to drive sheep does not necessarily imply a right to drive horned cattle; nor a right to drive unloaded, a right to drive loaded animals: for the consequences of the latter might be far more burthensome; since the owner of the way might be prevented planting, or be obliged to lop his trees to permit the passage of loaded, where he would not for unloaded animals. Put the case in this country, of a right or way for loaded elephants and camels. So the Roman Law did not allow a foot passenger to carry a pole or spear *upright*. *Quidam nec hastam rectam ei ferre licere; quia neque eundi neque agendi gratia id faceret; et possunt fructus eo modo lædi.*<sup>(d)</sup>

§ 40. The leading case is *Ballard v. Dyson*<sup>(e)</sup> which was an action of replevin. The defendant avowed taking a heifer damage-feasant, and issue was joined upon a plea in bar of 'a right of way to pass and repass with cattle from a public street, through and along a certain yard and way adjoining to the said place, in which, &c., towards and unto certain premises in the plaintiffs occupation as appurtenant thereon. On the trial it appeared, that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years; that the folding doors of it opened not to the plaintiff's yard, but to a highway; for many years it had been converted to the purposes of a stable; the last preceding occupier, who was a pork butcher, had used it as a slaughter-house for slaughtering his hogs; and the present occupier, who was a butch-

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(d) 7 de Re: rust.

(e) 1 Taunt. 279.

er, used it as a slaughter-house for slaughtering oxen. The yard in question, along which the right of way to these premises was claimed, was a narrow passage, bounded by a row of houses on each side, the doors of which opened into it: when a cart and horse was driven through it, the foot passengers could not pass the carriage, but were compelled, on account of the narrowness, to retreat into the houses; and they would be exposed to considerable danger if they were to meet horned cattle driven through it. It was in evidence that the preceding occupier had been accustomed to drive fat hogs that way to his slaughter-house; and that the plaintiff had been accustomed to drive a cart, the only carriage which he possessed, usually drawn by a horse, but in one or two instances by an ox, along this passage to this barn, where he kept his cart; there was then no other way to it. He had lately begun to drive fat oxen that way to the premises for the purpose of killing them there; but there was no evidence of any other user than this of the way for cattle. No deed of grant was produced. The defendant produced no evidence that he had ever interrupted the occupiers of the plaintiff's premises in driving cattle there, nor that they had been usually possessed of horned cattle which had not been driven that way; he admitted that there was sufficient evidence of a right of way for all manner of carriages. It did not appear at what period the houses adjoining the way had been built.

For the plaintiff it was contended, that a right of way for all manner of carriages necessarily included a right of way for all manner of cattle; and therefore proved the prescription. *Mansfield*, C. J., told the jury, that inasmuch as this was a private, and not a public way, they were not to conclude that a man might not grant a right of way to pass with horses and carts, and yet preclude the grantee from passing with all manner of cattle; and the degree of inconvenience which would attend the larger grant in this case, furnished an argument against the probability of it. He directed them, therefore, to say whether there was sufficient evidence of a right of way to drive cattle loose, or whether they would consider the

grant or prescription was only co-extensive with the use that had been made of it. The jury found a verdict for the defendant. A rule having been obtained and cause shown, the Court, after taking time to consider, discharged the rule for a new trial. The judgments delivered by the Judges were as follows—

*Mansfield*, C. J., observed, that

“ In general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there ; but the presumption would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from *Hawkins* only refers to *Co. Litt.*, and the passage in *Co. Litt.* does not prove that Lord *Coke* was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual import of the grant. The general description given by Lord *Coke* does not seem to touch the question. He refers to *Bracton*, who only says ‘there are *iter*, *actus* and *via* ; but says not a word to explain the meaning of either, or the difference between them. Nor can I find in any of the books, nor even in any *nisi prius* case, any decision that throws light upon the subject. A person has the *via* or *aditus* over a farm with carts to bring home his tithe, but he can use it for no other purpose. I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence, and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial, as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way to it, which could be used with very little, if any, inconvenience to himself ; yet there it would be a monstrous inference to conclude that, if a butcher could establish a slaughter-house at the inner end of the mews, without being indictable for a nuisance, he might, therefore, drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land, where, from the nature of the pre-

mises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there. The inconvenience in this case is a strong argument against the probability of a larger grant. The defendant was the proprietor of all these houses. My brother *Chambre* mentioned the case of a public way, restricted to carriages only, in which some public notice was affixed to caution the public that there was no drift-way, and thought that the absence of such notice in this case was an argument against the probability of the restricted grant. This notice might be requisite in a public way, but in a private way, out of which cattle were excepted, the grantor might reasonably think it unnecessary to give his grantee notice of that, of which he must already be conusant: he might justly suppose that the grantee, knowing the nature of his right, would not attempt to use the way otherwise than according to his grant. I can find no case in which it has been decided that a carriage-way necessarily implies a drift-way, though it appears sometimes to have been taken for granted. I speak with doubt, because my brother *Chambre* is of a different opinion; but I incline to hold that the verdict ought not to be disturbed."

*Heath*, J. said, "This is a prescription for a way for cattle, and a carriage-way is proved. A carriage-way will comprehend a horse-way, but not a drift-way. All prescriptions are *stricti juris*. Some prescriptions are for a way to market, others for a way to church, and in the ancient entries, both in *Rastal* and *Clift*, the pleadings are very particular in stating their claims. In *Rastal*, tit. *Quod permittat*, the distinction is clearly seen. Sometimes there is a carriage-way qualified. One claim is remarkable, *fugare quadraginta averia*. The usage then in this case is evidence of a very different grant from that which is claimed, namely, to drive fat oxen, animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighbourhood. The jury having heard the evidence, and formed their opinion upon it, I am not prepared to say that the verdict shall not stand."

*Lawrence*, J. said, "I should have been as well satisfied if the verdict had been the other way, but as the jury have decided upon the evidence, I am unwilling to disturb their verdict. This is the case of a prescriptive private way, which presumes a grant: the question then is, what was the grant in this case? That is to be collected from the use; for it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-way. In the entries are cases of prescription, not for carriages only

but for cattle also.(f) *Quod permittat ad carriandum et recarriandum blada, fenum, et finum, ac omnia alia necessaria sua, cum carris et carectis suis, et ad fugandum omnia et omnimoda averia sua.* The person who drew that entry certainly did not conclude that a carriage-way included a drift-way for cattle. The use proved here is of a carriage-way: the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle; for till they were driven there, no opposition could be made, nor the limitation of the right shown; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way, but the user of the way for pigs is not proof of a right of way for oxen. The grantor might well consider what animals it was proper to admit, and what not. The place is very narrow, and full of inhabitants. There is no danger from pigs, and carriages have always some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way; but if the cattle are driven forward serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant."

*Chambre, J.* said, "I think there ought to be a new trial; for all the evidence was on one side, and the verdict went against the evidence. I never thought that a carriage-way necessarily included a drift-way; but I think it is *prima facie* evidence, and strong presumptive evidence, of the grant of a drift-way. Undoubtedly a person may restrict his grant as he pleases, and when he has so limited it, the pleadings must be adapted to the particular grant; which accounts for the variety in the entries. But it rests with the grantor to prove the restriction of the grant; otherwise it must be intended to be of the usual extent. This inconvenience indeed may occur from such a determination, that, if the evidence be lost, the grantor may lose the benefit of his restriction, but he may and ought to preserve the evidence of the restriction; and the inconvenience would be of small extent; for I believe the cases are very few where a carriage-way has not been accompanied with this right. There seems to be almost a necessity for including it. The grantee may send back his horses without his carriage. He may draw his carriage with oxen, and the oxen, as well as the horses, must be driven back loose to pasture. There is strong presumptive evidence then of a drift-way.

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(f) Co. Ent. 5, 6.

If the burthen of the proof lies on the tenement, it certainly is possible that he may loose the right of restraining the way, but for one case where the evidence has been lost, and would be supplied by this decision, there will be a thousand cases where a restriction will be created that did not exist in the original grant. I fear these rights of way will be very much narrowed, if they are to be confined to such actual use of them as can be proved. The manner of using a way may vary from time to time. I think the proof of driving hogs is an important circumstance, and very strong evidence of a grant of way for cattle. According to the doctrine contended for, it would be necessary to drive every species of cattle in order to preserve the right of passing with that species. If a man had a little field where cows had not usually been pastured, it would be monstrous that he therefore should not drive his cow to it. Suppose any new species of cattle is introduced into the country, shall the grantees of private ways have no passage for them to their lands? Is it contended, for instance, that no ancient private way in the kingdom can be used for Spanish sheep? Much of the argument has been built upon these being horned cattle. Many breeds of kine have no horns, may the grantee drive those? As to the argument that the inconvenience of such an use amounts to a nuisance, nothing of that sort appears. The grantee has constantly driven all the carriages and all the cattle that he had. This is a claim by prescription, which imports great antiquity, and it does not appear how wide the way was at the time of the original grant, and how much the houses have encroached on it long since, but those encroachments cannot deprive the grantee of his ancient right of way."

§ 41. Assuming this case, writes Mr. Gale, to have been properly decided, it would appear, that, in the English law, a right of way of any one kind does not of necessity include any other kind. Supposing the question to arise upon the record, a plea of a right of way to drive carts or carriages would be no answer to an alleged trespass in riding on horse back across a man's land; or if pleas were framed strictly in accordance with the facts in *Ballard v. Dyson*, a plea of a right of passage for carts would be no justification to a trespass committed by driving cattle. Assuming this to be correct, a further question of considerable difficulty arises, "whether proof of the user of any one kind of way may be evidence of a right of any other kind;" or whether, to use the words of *Chambre, J.*, in *Ballard v. Dyson*, "it would be necessary to drive every species of

cattle in order to preserve the right of passing with that species.”(g)

§ 42. As to the right to support of surface and buildings thereon, the right inherent in property (the upper half of which has been considered) extends downward perpendicularly ‘*ad inferos*.’ Therefore if the owner of adjacent land dig under my surface, he is clearly a trespasser on my property ; but so far as my right to *lateral* support from the adjacent land is concerned, my right is not inherent in my own property, but an *easement* attaching to my neighbour’s. All adjacent possessions are mutually dominant and servient for this purpose. A man must not dig so near on the confines of his own territory as to endanger my soil. By the Civil Law, if a man dig a sepulchre or a ditch, he shall leave between it and his neighbour’s land a space equal to its depth : if he dig a well, he shall leave the space of a fathom. And the French law requires the same precaution.

§ 43. Where the natural lateral pressure of my soil has been increased by my having raised buildings on my property, it is clear that I can only obtain a right to lateral support from my neighbour as an easement : that is, by express contract, or by *user*. In the case of *Partridge v. Scott*,<sup>(h)</sup> the action was brought for an injury to the plaintiff’s reversion by defendants’ undermining their own land, wrongfully, carelessly, negligently, and improperly, and without supporting or propping up the same, and removing the minerals, to the support of which mines and minerals for his premises the plaintiff was entitled, by reason whereof, and by the carelessness and improper conduct of the defendants, the foundation of the plaintiff’s premises was injured, the ground gave way, and the walls and houses were damaged. The second count was similar, referring to an injury to another messuage. The defendants pleaded, denying the plaintiff’s right to support, as claimed in the declaration. The

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(g) See also *Cowling v. Higginson* 4 M. & W. 245 *Higham v. Rabbett* 5 B. N. C. 623 *Brunton v. Hall* 1 G. & D. 207.

(h) 3 M. and W. p. 220.



jury found for the plaintiff, subject to a case. After stating the pleadings, the case proceeded as follows:—The jury found that the plaintiff was possessed of a certain dwelling-house and premises, partly erected upon excavated land within four years before the injury complained of, being the house and premises to which the second count in the declaration referred, and of other houses, land, and premises, the buildings on which had been erected about thirty years before, and which are those included in the first count.

They also found that the defendants excavated so near their own boundary (the direction of which boundary was east and west) the mines belonging to themselves, as to cause damage thereby to all the plaintiff's premises, and to cause the adjoining land of the plaintiff, not covered with buildings, to sink also. The defendants began to work their mines after the new house and buildings of the plaintiff had been finished. They sunk their shaft or pit about one hundred yards from the plaintiff's premises on the south side thereof, and worked the coal northward towards those premises.

The Jury also found, that, in order to have prevented any injury from the defendant's works to the plaintiff's premises, a rib of coal ought to have been left between those parts of the substrata over which the plaintiff's buildings and premises were situated and the works of the defendants, at least twenty yards in thickness; that the defendants worked their mines, leaving a rib of coal in these places of less than ten yards in thickness, and that they were aware that the coal had been worked out some years before on the north or plaintiff's side of their boundary, where the boundary joined the plaintiff's premises; that in so doing the defendants were guilty of negligence in not leaving a rib of sufficient thickness if the plaintiff was entitled to support from the defendant's land and substrata. The Court was to be at liberty to draw any reasonable conclusion which the jury might have drawn.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiff is entitled to recover; and, if he is, then whether he is entitled to damages for the old houses and land alone, or for the more recent erec-

tions also? The case having been argued, the Court took time to consider: the judgment of the Court was delivered by *Alderson, B.*—He said:

“The two Questions in this case are of considerable importance. The facts may be shortly thus stated: The plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years, before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the ancient house; and the court cannot therefore intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago.

“Under these circumstances, the question is precisely similar as to both houses, and is one on which the Court do not entertain any doubt.

“Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

“In this case, if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants; unless at the time, by some grant, he was entitled to additional support from the land of the defendants.

“There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord *Tenterden's* Act, until after the lapse of at least twenty

years from the time when the house first stood on excavated ground, and was supported in part by the defendant's land.

"If the law stood as it did before Lord *Tenterden's* Act,<sup>(i)</sup> we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that act, the lapse of time, under these peculiar circumstances, would probably make no difference. For the proper construction of that act requires that the easement should have been enjoyed for twenty years under a claim of right. Here neither party was acquainted with the fact that the easement was actually used at all; for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right; and that Lord *Tenterden's* Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point.

"We think, upon the whole, that the defendants are entitled to our judgment."

In *Hunt v. Peake*<sup>(j)</sup> it was held that a landowner has a right independent of prescription to the lateral support of his neighbour's land, so far as that is necessary to sustain his soil in its natural state, and also to compensation for damage caused either to the land or to buildings upon it by the withdrawal of such support.

And in the *North Eastern Railway Company v. Elliott*,<sup>(k)</sup> although as between counterminous owners, the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state, yet where a person sells land to another to be used for an express purpose, he will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unfits the land sold for the purpose for which it was sold, and it makes no difference that the land so sold was taken under compulsory powers.

But the purchaser is not entitled to any additional support afforded by the accidental state in which the adjacent soil happens to be at the time of the purchase, however long it may have been in that state prior to the purchase.

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(i) 2 & 3 Will. 4, C. 71, s. 2.

(j) 6 Jur. n. s. 107.

(k) 6 Jur. n. s. p. 817.

Therefore, where the owners of a drowned mine sold land to a Railway Company for the purpose of building a bridge, and the land sold derived additional support from the water in the mine: it was held, that the Railway Company was not entitled to restrain him from pumping out the water and restoring the mine to a working condition, although the mine had continued in its drowned state, and the works had been abandoned for forty years prior to the purchase.

In *Brown v. Robins*,<sup>(1)</sup> the plaintiff was owner of a house erected in 1834 on solid ground. Previously to the building of the house, a portion of the minerals had been gotten under a garden which adjoined the house. In 1838 a portion of the minerals was gotten under the defendant's land, which adjoined the garden. In 1855 the defendant commenced getting out the rest of the minerals under his land. In 1857 the plaintiff's land sunk, and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings; that some damage would have happened, but not to the same extent, if the garden-ground had been left solid; that the defendant knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was 300*l.*; 250*l.* occasioned solely by the defendant's working, and 50*l.* damages, caused, in part, by the excavations under the garden:—It was held, first, that, inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, he was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil or not.

And, secondly, that although the excavations under the garden contributed, to the extent of 50*l.*, to cause the damage, the plaintiff was entitled to the whole 300*l.*, because if the defendant had not done the wrongful act complained of, no part of the damage would have occurred.

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(1) 28. L. J. Exch. 250.

In *Solomon v. Vintner's Company*,<sup>(m)</sup> three contiguous houses in a street visibly leaned out of the perpendicular for upwards of thirty years, A's house leaning on B's house. On the expiration of a lease to a tenant, B. took down his house, the effect of which, by removing the support, was to cause C's house to fall down; and C's house falling, A's house fell:—It was held, that the fall of A's house did not give him a right of action against B. for that A. had not either a natural or acquired right to have his house supported by B's, through the intermediate house.

And in *Bibby v. Carter*,<sup>(n)</sup> in an action by a reversioner, a count alleged, that a messuage and land in fact received lateral support from, and were supported by, the land adjoining, yet the defendant wrongfully and negligently dug and made excavations in the land so adjoining, and without sufficient shoring, propping, or otherwise protecting the messuage and land from the effects thereof, and thereby deprived the messuage and land of their support, whereby the land and messuage sank. Another count stated that the plaintiff was, by reason of the interest in the messuage and land, entitled to have the messuage supported laterally by land adjoining, yet the defendant wrongfully and negligently dug and made excavations in the land adjoining, and without sufficiently shoring, propping, or otherwise protecting the messuage and land, and thereby deprived the messuage of the support to which the plaintiff was so entitled as aforesaid, whereby the messuage and land sank:—Held, that both counts disclosed a right of action, as well in respect of the injury to the house as to the land.

§ 44. But no unnecessary burthen must be cast upon the servient tenement. Therefore the dominant tenement must be kept in repair, must be originally well built.

§ 45. The right of support to buildings by buildings is of most usual occurrence in towns and cities, where dwellings are built in streets. A nice observation occurs here: suppose

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(m) 5 Jur. n. s. 1177.

(n) 28 L. J. Exch. 182.

a man to have built perfectly perpendicularly, there could be no pressure on the adjacent house : and if not, though there may in fact have been long continued pressure, was it not *clam*, not open ? Where the pressure is apparent, as where beams are inserted in the neighbouring wall, or supports rest against it, of course the assertion of right is open.

§ 46. Where an easement exists, any damage by the exercise of the right on the part of the owner, to the servant tenement on his own land is actionable. His only exemption arises from the act whereby the injury has arisen being inevitable and beyond his controul : as the violence of winds or floods, or other act of God : *Actus Dei nemini facit injuriam* : for the maxim is *Sic utere tuo ut alienum non lædas*. Thus *Comyn* in his Digest says an action lies for misfeasance though the damage happen by misadventure ; and he puts the case of a man firing at a bird, and the wadding setting fire to his neighbour's thatch. So *Rolle* in his Abridgment says:—

“ If my servant puts a candle or other fire in a place in my house, and it falls and burns all my house and the house of my neighbour, action on the case is against me by him ; and the law is the same if my guest should do it.”

§ 47. So in the case of *Vaughan v. Menlove*,<sup>(c)</sup> which was an action brought by the plaintiff for an injury to his reversion, occasioned by the defendant making a rick of hay on his own land near some cottages of the plaintiff, which was ‘ liable and likely to ignite, take fire, and burst out into a flame, of which the defendant had notice, by means whereof the said rick did ignite, take fire, and burst into flame, and by flame issuing therefrom the plaintiff's cottages were set on fire, and thereby, through the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick in such condition, the said cottages were burnt down.’ The defendant pleaded not guilty—that the said rick or stack of hay was not likely to ignite, take fire, and break out into flame, nor was the same, by reason of such liability, danger-

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(c) 4. Scott. 244.

ous to the plaintiff's cottages, nor had the defendant notice thereof—and other pleas, which denied that the damage occurred through the defendant's negligence.

It appeared at the trial, that the rick in question had been made by the defendant near the boundary of his own premises; that the hay when put together was in such a state as to cause persons to warn the defendant that there was danger of its taking fire; that he made some attempts to prevent this by making a chimney in the rick; that the rick burst into flames from the spontaneous ignition of the materials, and the flames communicated to and destroyed the plaintiff's cottages.

*Patteson, J.*, left it to the jury to consider, "whether the fire had been occasioned by gross negligence on the part of the defendant;" adding, "that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances." The jury having found for the plaintiff, a rule for a new trial was obtained, on the ground that the proper question to have been left to the jury was, whether the defendant had acted *bond fide* to the best of his judgment, the standard of "ordinary prudence" being too uncertain to afford any criterion.

The argument went entirely on the question of negligence; and the decisions upon the degree of caution required in taking negotiable instruments were relied on for the defendants. The Court discharged the rule. *Tindal, C. J.*, said,

"I agree that this is a case of the first impression; but I feel no difficulty in the application to it of the principle upon which the determination of it must rest. This is neither a case of contract nor a case of bailment, where the degree of care which the party is called upon to exert is measured by the nature and character of the bailment. But the case falls within the general rule of law, which requires that a man shall so use his own property as not to injure or destroy that of his neighbour, and which renders him liable for all the consequences resulting from the want of due care and caution in the mode of enjoying his own. Under the particular circumstances of this case, I feel no hesitation in holding the defendant to have been as much the raiser of the fire as if he had put a lighted match to the hay-rick: for it is

well known that hay stacked in a green or damp condition will from natural causes ferment and ignite.

"In *Turberville v. Stampe*, an action was held to be maintainable under circumstances very similar to those of the preceding case: Case on the custom of the realm, *quare negligenter custodivit ignem suum in clauso suo, ita quod per flammam blada quer. in quodam clauso ipsius quer. combusta fuerunt*. After verdict *pro quer.*, it was objected, the custom extends only to fire in a house or curtilage (like goods of guests), which are in his power. *Non alloc.*; for, the fire in his field is his fire, as well as that in his house: he made it, and must see that it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another. But if a sudden storm had arisen, which he could not stop, it was matter of evidence, and he should have showed it. And *Holt, Rokesby* and *Eyre*, against the opinion of *Turton*, who went upon the difference between fire in a house, which is in a man's custody and power, and fire in a field, which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment, according to the opinion of the other three.

"But the case of a chemist, mixing substances which alone are perfectly innocent, but which are liable to explode on coming into contact, and thereby occasioning damage to his neighbour: who could for a moment doubt that the injured party would have a remedy by action? I am clearly of opinion that the damage in this case was properly the subject-matter of an action."

"But it is contended that the learned Judge mistook the extent of the defendant's liability; and that, under the particular circumstances of this case, the defendant was not bound to adopt such measures as a man of ordinary prudence would have resorted to for the purpose of averting the threatened danger; but that it was sufficient if he acted according to the best of his own individual judgment; and therefore the learned Judge ought not to have left the case to the jury as one of gross negligence, but should have left it to them to say whether or not the defendant had acted honestly and *bonâ fide* according to the best of his judgment. The first observation that suggests itself, in answer to that argument, is, that, seeing the infinite gradations of intellect and judgment, the doctrine contended for would lead to an inconvenient vagueness and uncertainty in a case which perhaps, more than all others, requires that the rights and liabilities of the parties should be well and accurately defined.

"It is said, that there is nothing intelligible in the rule which has



in many cases obtained, requiring from a party under circumstances analogous to those of the present case, the exercise of that degree of care which a prudent and cautious man would be expected to use. Such, however, has always been the rule in cases of bailment, as laid down by Lord Holt in *Coggs v. Barnard*, though in some cases of bailment a smaller, in others a greater degree of diligence and care are exacted. That learned Judge says, 'In the second sort of bailment, viz., *commodatum*, or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so, if the bailee be guilty of the least neglect, he will be answerable; as, if a man should lend another a horse to go westward, or for a month, if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.

"It is for the jury to say whether or not, under the circumstances, the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man; and such was in substance the direction of the learned Judge. To hold the degree of care to be sufficient if co-extensive with the judgment of the individual, would introduce a rule as uncertain as it is possible to conceive. In the present case, it appears to me that the defendant not only failed to observe the degree of care and caution that the law required of him, but was guilty of very gross negligence. I therefore think the rule must be discharged."

*Park, J.*—"I am of the same opinion. Although the facts in this case are novel, they clearly bring it within the rule of law, that a man shall so use his own property as not to do injury to his neighbour. The case of *Turberville v. Stampe* is, in principle, very like the present, though in its circumstances more like the case that was tried in Berkshire, as alluded to by my brother *Talfourd*. The direction of the learned Judge seems to me to be perfectly correct. It clearly was proper to leave it to the jury to say whether or not the defendant was guilty of gross negligence; and I think their finding was well warranted by the evidence."

*Gaselee, J.*—"My Lord Chief Justice and my brother *Park* having gone so fully into the matter, it is not necessary for me to say more

than that I entirely concur with them. The action is clearly consistent with the principle upon which the decisions referred to turned."

*Vaughan, J.*—"The principle upon which we hold this action to be maintainable is by no means new. It is at least as old as *Turberville v. Stampe*. It has been strenuously urged that the law cast no duty upon the defendant under the circumstances. To that, however, I cannot agree. It clearly was his duty, whilst enjoying his own premises, to take care that his neighbour was not injured by any act or neglect of his. It appears to me that the defendant's conduct was such that no jury would be warranted in coming to any other conclusion than that he had been guilty of gross negligence: for when the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state, were pointed out to him, he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that 'he would chance it.' That which might be expected under the circumstances to have been the conduct pursued by a prudent and careful man has always been taken for the criterion in cases analogous to the present. For example, in actions on policies of assurance, where the ship or goods, the subject-matter of the adventure, have been sold by the master for the benefit of the concerned, the question left to the jury has invariably been, whether or not the course pursued by the master has been such as a prudent and cautious man, having a due regard to the interest of all parties, ought, under the peculiar circumstances, to have adopted. In this case I think the jury would not have found for the plaintiff, unless they had been satisfied that the defendant had been guilty of gross negligence; a conclusion to which all the evidence directly pointed."

§ 48. But where there is no easement, it appears that a man though he do not deal so carefully with his own property as he might, and the result is damage to his neighbour's property, is not responsible. The case of *Trower v. Chadwick*(p) in which the Exchequer Chamber reversed the decision of the Court of Common Pleas, is the leading authority: there *Parke, B.*, delivering the judgment of the Court said,

"We are unanimously of opinion that the judgment of the Court below must be reversed. The question arises upon the second count of the declaration, which states that the plaintiffs were possessed of a certain

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(p) 6 Bingh. 4. C. 1.

vault and of certain wine therein, and that the defendant was about to pull down and did pull down and prostrate certain other vaults and walls next adjoining the vault of the plaintiffs: the count then goes on to state that thereupon it became and was the duty of the Defendant, in the event of his not shoring up or protecting the plaintiff's walls, to give due and reasonable notice to the plaintiffs of his, the defendant's intention to pull down his vaults and walls, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves. It then goes on to allege another duty in the defendant, viz., to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, &c. so adjoining the plaintiff's vault, so that, for want of such care, skill, and precaution, the plaintiff's vault and its contents might not be damaged or destroyed, or the plaintiffs be injured in respect thereof; and it then proceeds to allege as a breach that the defendant wrongfully and injuriously pulled down, prostrated, and destroyed the vaults, &c. so adjoining the plaintiff's vault, without giving them due or reasonable or other notice of his, the defendant's, intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiff's vault, and the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down or prostrating or removing the vaults, &c. so adjoining the plaintiffs vaults, upon that occasion, according to his said duty. And a general verdict has been found for the plaintiffs, with general damages.

"The Plaintiffs do not in this count allege any right to have their vault supported by the vaults or walls of the defendant; therefore no right of theirs has been injured by the act of the defendant. The duty to give notice is charged as one arising from the contiguity of the defendant's vault to that of the plaintiffs. No doubt can be entertained as to the opinion of the Court of Common Pleas upon this question. The Lord Chief Justice, in delivering the judgment of the Court, says, 'There is no allegation in this count of any right of *easement in alieno solo*, which forms the ground of the plaintiff's action in the first count. And, as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore up himself, it is objected, and we think with considerable weight, that no such obligation results, as an inference of law, from the mere circumstances of the juxta-position of the walls of the defendant and the plaintiffs.' We also think it is impossible to say that under such circumstances the law imposes upon a party

any duty to give his neighbour notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantive ground for damage: and the probability is, that the main damage did result from the want of notice; for it is obvious, that if notice had been given, the plaintiffs might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think the judgment must be arrested, and a *venire de novo* awarded."

"But, supposing that the improperly pulling down the defendant's vaults and walls may be treated as the substantive cause of action, and that the second branch of the argument that has been urged on the part of the plaintiffs is well founded (which we think it is not), then the question arises, whether any such duty as that which is alleged to have been violated is by law cast upon the defendant. The duty alleged to be cast upon the defendant by reason of the proximity of his premises to those of the plaintiffs, is, 'to use due care and skill, and to take due, reasonable and proper precautions in and about the pulling down and prostrating and removing the said vaults, buildings, and walls adjoining the plaintiff's vault, so that for want of such care, skill and precaution, the vault of the plaintiffs, and the contents thereof, might not be damaged, or destroyed on that occasion, or the plaintiff's injured in respect thereof, and the breach alleged is, 'that the defendant did not nor would use due care or skill, or take due, reasonable or proper precaution in or about the pulling down, prostrating or removing the said vaults, buildings or walls so adjoining the said vault of the plaintiffs, according to his duty.' The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognizant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence: for one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think no such obligation as that alleged exists in the absence of notice. And, therefore, upon this ground also we think the count is bad; and consequently there must be a *venire de novo*."

§ 49. So in *Bagnall v. London and North Western Railway Company*,<sup>(q)</sup> a railway company, under the authority of an act of Parliament, took for their line ground lying over mines, then not worked, belonging to the former owner of the surface. In order to gain the level of their line the company took away a stratum of clay, and left a surface of porous rock ; they carried on the line, at a slight ascent, to a brook at some distance, over which they carried the line by a flat bridge, not constructed so as to contain the waters in times of flood. Between this brook and the surface of the mine there was originally a rising ground, through which the company made a cutting for the level of their line. Afterwards the owner of the mines began to work them, and the line began to sink ; the company kept up the level of the line by heaping ashes and such substances thereon, and on the drains by the side of the line, which had also sunk. The company were bound to keep up these drains, but, after they had sunk, did not. A flood came, and the waters of the brook, where it is crossed by the bridge, overflowing the girders, were carried down along the hollow of the line and of the drains to the spot overlying the mines, and, sinking through the porous rock, deluged the mines and stopped the works :—It was held, that the owner of the mines had a right of action against the company for the injuries arising from both the overflow from the brook, and the fall of rain-water on the spot, and the overflowings of the spring laid open in the cutting, and that his remedy did not lie in compensation under the act of Parliament.

Easements as it has been observed, impose a burthen *pati*, not, *agere* : and therefore there is generally no burthen to repair cast on the servient tenement. If repair is wanted, the owner of the dominant tenement must make it. “ By the common law ” says Lord *Mansfield* in *Taylor v. Whitehead*<sup>(r)</sup> “ he that hath the use of a thing ought to repair it.”

§ 50. An easement, if extinguished by contract, in England must be by release under seal ; for the general rule is, that every

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(q) 8 Jur. n. s. 16.

(r) 2 Dougl : 745.

thing must be dissolved by as high an instrument as that when by it is created. *Nihil tam conveniens est naturali aequitati quam unumquodque dissolvi eo ligamine quo ligatum est.* If I am right in assuming that a grant is not necessary in India, it follows that the Easement may be destroyed here by parol agreement: and thus even by the English law a Easement is extinguished, if the owner of the dominant tenement permit the owner of the servient tenement to do any thing which necessarily prevents the future enjoyment of the Easement. So the Roman law.

*“ Si stillicidii immittendi jus habeam in aream tuam, et permisero jus tibi in eà areà ædificandi, stillicidii immittendi jus amitto; et similiter, si per tuum fundum via mihi debeatur, et premisero tibi in eo loco per quem via mihi debetur aliquid facere, amitto jus viæ.”*

§ 51. An Easement is extinguished by cessation of enjoyment. So in *Moore v. Rawson*,<sup>(a)</sup> it appeared that the plaintiff, having some ancient windows, pulled down the wall in which they were situated, and rebuilt it as the wall of a stable, without any window. About fourteen years after this, the defendant erected a building in front of this blank wall, and after such building had remained there about three years, the plaintiff re-opened a window in the same place that one of the ancient windows had formerly stood, in, and brought this action for the obstruction to his newly-opened window by the defendant's building.

A rule having been obtained to enter a nonsuit, pursuant to liberty reserved at the trial, the Court of K. B. made the rule absolute.

*Abbott*, C. J., in delivering his judgment, said,

“I am of opinion that the plaintiff is not entitled to maintain this action. It appears that many years ago the former owner of these premises had the enjoyment of light and air by means of certain windows in a wall in his house. Upon the site of this wall he built a blank wall without any windows. Things continued in this state for seventeen years. The Defendant, in the interim, erected a building opposite the

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(a) 3 B. & C. 332.

plaintiff's blank wall, and then the plaintiff opened a window in that which had continued for so long a period a blank wall without windows; and he now complains that that window is darkened by the buildings which the defendant so erected. It seems to me, that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that, at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that it was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burthen of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect. For these reasons I am of opinion, that the rule for a nonsuit must be made absolute."

*Bayley, J.*, said, "The right to light, air, or water, is acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment, or shows an intention to continue it. In this case the former owner of the plaintiff's premises had acquired a right to the enjoyment of the light; but he chose to relinquish that enjoyment, and to erect a blank wall instead of one in which there were formerly windows. At that time he ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it. Suppose that, instead of doing that, he had pulled down the house and buildings, and converted the land into a garden, and continued so to use it for a period of seventeen years, and another person had been induced by such conduct to buy the adjoining ground for the purposes of building. It would be most unjust to allow the person who had so converted his land into garden ground, to prevent the other from building upon the adjoining land which he had, under such circumstances, been induced to purchase for that purpose. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he does some act to show that he means to resume it within a reasonable time."

*Holroyd, J.*, added, "I am of the same opinion. It appears that

the former owner of the plaintiff's premises at one time was entitled to the house with the windows, so that the light coming to those windows over the adjoining land could not be obstructed by the owner of that land. I think, however, that the right acquired by the enjoyment of the light continued no longer than the existence of the thing itself in respect of which the party had the right of enjoyment; I mean the house with the windows: when the house and the windows were destroyed by his own act, the right which he had in respect of them was also extinguished. If, indeed, at the time when he pulled the house down, he had intimated his intention of rebuilding it, the right would not then have been destroyed with the house. If he had done some act to show that he intended to build another in its place, then the new house, when built, would in effect have been a continuation of the old house, and the rights attached to the old house would have continued. If a man has a right of common attached to his mill, or a right of turbary attached to his house, if he pulls down the mill or the house, the right of common or of turbary will *prima facie* cease. If he show an intention to build another mill or another house, his right continues. But if he pulls down the house or the mill without showing any intention to make a similar use of the land, and, after a long period of time has elapsed, builds a house or mill corresponding to that which he pulls down, that is not the renovation of the old house or mill but the creation of a new thing, and the rights which he had in respect of the old house or mill do not, in my opinion, attach to the new one. In this case, I think, the building of a blank wall is a stronger circumstance to show that he had no intention to continue the enjoyment of his light than if he had merely pulled down the house. In that case he might have intended to substitute something in its place. Here he does, in fact, substitute quite a different thing—a wall without windows. There is not only nothing to show that he meant to renovate the house so as to make it a continuance of the old house, but he actually builds a new house different from the old one, thereby showing that he did not mean to renovate the old house. It seems to me, therefore, that the right is not renewed as it would have been, if, when he had pulled down the old house, he had shown an intention to rebuild it within a reasonable time, although he did not do so *eo instanti*."

*Littledale*, J, said, "According to the present rule of law a man may acquire a right of way, or a right of common, (except, indeed, common appendant,) upon the land of another, by enjoyment. After twenty year's adverse enjoyment the law presumes a grant made



before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. I think, that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does any thing to show that he did not mean to convert the land to a different purpose, then his right would not cease. In this case, I think that the owner of the plaintiff's premises abandoned his right to the ancient lights, by erecting the blank wall instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light which he once had. Under those circumstances, I think that the temporary disuse was a complete abandonment of the right."

§ 52. The material question is, whether the cessation or alteration arose from an *intention* to *abandon* the right, which must be evidenced by the acts of the party. A blocking up, of a temporary nature, of a window, as by boards nailed over it, might bear a very different construction from filling up the same space with bricks and mortar, and the like.

§ 53. Express notice of an intention *not* to abandon may be shown. The erection, unopposed by the owner of the servient tenement, of a wall, during the blocking up, which would interfere with the reopening or the enjoyment of the former right in its fullness, would afford the same test. It is a species of encroachment. The character of the alteration in the dominant, or of the encroachment by the servient tenement owner, will give the measuring cast. Thus in *Luttrell's case* (t) an action was brought for the diversion of water. The declaration stated, that the plaintiff, on the 4th of March in the 40th year of Elizabeth, was seised in fee of two old and ruinous fulling-mills, and that from time whereof, &c.

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(t) 4 Rep. 87. a.

*magna pars aquæ ejusdam rivuli* ran from a place called Hod weir to the said mills; and that for all the said time there had been a bank to keep the water within the current; and that afterwards the plaintiff, on the 8th October, 41 Eliz., pulled down the said fulling-mills, and in June, 42 Eliz., in place of the said fulling-mills erected two mills to grind corn, and the said water ran to the said mills until the 10th September next following; and the same day the defendants *foderunt et fregerunt* the bank, and diverted the water from his mills, &c.

"The defendants pleaded not guilty, and it was found against them, on which the plaintiff had judgment; upon which the defendant brought a writ of error in the Exchequer Chamber, on which two errors were assigned. The principal of these was, that by the breaking and abating of the old fulling-mills, and by the building of new mills of another nature, the plaintiff had destroyed the prescription and could not prescribe to have any water-course to grist-mills: 'As if a man grants me a water-course to my fulling-mills, I cannot, as it was said, convert them to corn-mills, *nec e contra*'.

"One of these cases cited in argument was from<sup>(u)</sup> 'where the abbot of Newark granted by fine to find three chaplains in such a chapel of the conusee, afterwards the said chapel fell, and there *tenetur*—(during the time there is no chapel) the divine service shall cease, for it ought to be done in a decent and reverend manner, and not at large, *subdio*; but *tenetur*, if the chapel is rebuilt in the same place where the old stood, then he ought to do the divine service again: 'but (it was collected) if it is built in another place, then the grantee is not bound to do divine service there.

"The next case cited strongly supports the principle, that an alteration, whereby a greater burthen would be imposed, destroys the right altogether. 'If there be lord and tenant, and the tenant holds to cover and repair the lord's hall, as in the 10 Edw. 3, in this case, if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length or breadth, so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cow-house, a stable, a kitchen, or the like, he is not bound to cover it; for the lord, by his act, cannot alter

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(u) 10. Hen. 7, 13 a, b, and 16 Hen. 7, 9, a, b.

the nature of the tenure, nor of the service which the tenant ought to do.'

"It was contended in argument, that the alteration from fulling-mills to corn-mills might be injurious to the grantor, because he might have corn-mills himself, the proximity of others to which might injure him; and the principle was denied, that a man may preserve an easement by rebuilding on the same spot, and in the same manner, unless the previous destruction had been caused by some act of God, as by tempest or lightning; but it was resolved, that the prescription did extend to these new grist-mills, for it appears by the register, and also by *Fitz. Nat. Brev.* that if a man is to demand a grist-mill, fulling-mill, or any other mill, the writ shall be general, *de uno molendiao*, without any addition of grist or fulling. 21 Ass. 23, agrees of a plaint in assize; so that the mill is the substance and thing to be demanded, and the addition of grist or fulling are but to show the quality or nature of the mill; and therefore, if the plaintiff had prescribed to have the said water-course to his mill generally, (as he well might,) then the case would be without question that he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water as as it was before; and it should be intended that the grant to have the water-course was before the building of the mills, for nobody would build a mill before he was sure to have water, and then the grant of a water-course being generally to his mill, he may alter the quality of the mill at his pleasure as is aforesaid.

"So if a man has estovers, either by grant or prescription, to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed; and although he builds a new chimney, or makes a new addition to his old house, by that he shall not loose his prescription, but he cannot employ or spend any of his estovers on the part newly added,—the same law of conduits and water-pipes and the like.

"So, if a man has an old window to his hall, and afterwards he converts the hall into a parlour, or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house; and although in this case the plaintiff has made a question, forasmuch as he has not prescribed generally

but particularly to his fulling-mills, yet forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only of the quality or name of the mill, and that without any prejudice in the water-course to the owner thereof, for these reasons it was resolved that the prescription remained."

So in the recent case of *Hall v. Swift*,<sup>(v)</sup> where the plaintiff had a right to water flowing from the defendants land, across a lane, to his own land, and it appeared, that, formerly, the stream meandered a little down the lane before it flowed into the plaintiff's land, and that, in the year 1835, the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises; and this, it was contended, negatived the right claimed in the declaration. *Tindal*, B. J., in his judgment, said—

"If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment,—the making straight a crooked bank or foot-path would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself."

§ 54. A good instance of *non user* without any intention to abandon, whereby the right is not lost, occurs in the case of fountains, which dry up for a season and burst forth again. Here the right revives with the flow of water. This case is likely to occur in India. In *Hall v. Swift*, above quoted, *Tindal*, C. J., said,

"It is further objected, that the right claimed has been lost by desuetude, the water having many years since discontinued to flow in its accustomed channel, and having only recommenced flowing nineteen years ago. That interruption, however, may have occasioned by the excessive dryness of seasons, or from some other cause over which the plaintiff had no control. But it would be too much to hold that the right is, therefore, gone; otherwise, I am at a loss to see why the interven-

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(v) 6 Scott 167.

tion of a single dry season might not deprive a party of a right of this description, however long, the course of enjoyment might be."

§ 55. So the Civil Law "*Hi qui ex fundo sutrino aquam ducere soliti sunt, adierunt me, proposueruntque—aquam, qua per aliquot annos usi sunt, ex fonte qui est in agro sutrino, ducere non potuisse, quod fons exarisset; et postea ex eo fonte aquam fluere cepisse, petierunt que me—ut quod jus non negligentia aut culpa sua amiserant, sed quia duerre non poterant, his restitueretur. Quorum mihi postulatio cum non iniqua visa sit succurrendum his putari. Itaque quod jus habuerant tunc cum primum ea aqua pervenire ad eos non potuit, id eis restituere placet.*"(w)

§ 56. When there has been an encroachment by the dominant, and its amount can be ascertained and separated, it may be so; and the original easement remain; but when the encroachment is of such a nature as not to be capable of reparation, the easement is lost. The man pays the penalty of his own act. He shall not impose an additional burthen on the servient. The Roman law recognized this difference. Thus though an excessive or unwarranted use were made of a right of way, the right nevertheless remained, the party being punishable for the trespass.

"*Si is cui via vel actus debebatur, ut vehiculi certo genere uteretur, alio genere fuerit usus, videamus ne amiserit servitutem; et alia sit ejus conditio qui amplius oneris quam licuit vexerit, magisque hic plus quam aliud egisse videatur—sicuti si latiore egisse videatur—Sicuti is latiore itinere usus esset, aut si plura jumenta egerit quam licuit, aut aquæ admiscuerit aliam. I deoque in omnibus istis quæstionibus servitus quidem non amittitur, non autem conceditur plus quam pactum est in servitute.*"(x)

§ 57. But a roof might not be so lowered as to render the *stillicidium* more burthensome.

"*Stillicidium quoquo modo acquisitum sit altius tolli potest, levior enim fit eo facto servitus—cum quod ex alto cadet lenius et interdum direptum, nec perveniet ad locum servientem—inferius demitti non potest quia fit gravior servitus, id est, pro stillicidio flumen. Eadem causa retro duci potest stillicidium; quia in nostro magis incipiet cadere; prodromi non potest, ne in alio loco cadat stillicidium quam in quo posita servitus est;*

(w) L. 35, ff. de. serv. prad. rust.

(x) L. 11, ff. quem. serv. amit.

*lenius facere poterimus, acrius non. Et omnino sciendum est—melio-  
rem vicini conditionem fieri posse, deterio-rem non posse, nisi aliquid nominatim  
servitute imponenda immutatum fuerit."*

§ 58. An injury arises not only where the entire ease-  
ment is prevented, but where it is in any way substantially  
lessened or deteriorated.

"Item" says Bracton, "*si quis aliquid fecerit quominus ad fontem,  
&c., ire possit, vel haurire, vel de fontana aqua, non tantam aquam ducere  
vel haurire, tales cadere possunt in assisam."*

§ 59. Nor must the secondary easements, by which the  
principal is enjoyed, be interfered with.

"Item" says Bracton, "*si quis ire ad fontem prohibetur, habet actionem  
quare quis obstruxit, quia cui conceditur hauritus ei conceditur iter ad  
fontem et accessus*" but mere threats signify nothing.

§ 60. The remedy may be by the act of the party, who has  
a right to enter upon the land of the servient tenement to  
abate a recent nuisance. If a man make a ditch in his own  
land, by means of which the water which runs to my mill  
is diminished, I may myself fill up the ditch.

§ 61. If a man erects upon his own soil any thing which  
is a nuisance to my mill, house, or land, I may remain on my  
own soil and throw it down. And so I may enter on his soil  
and throw down the nuisance, and justify this in an action of  
trespass.

§ 62. If a nuisance be made to my freehold, I may enter  
on his land who made it, and deject the nuisance. If a  
man stops my way to my common, and incloses the com-  
mon, I may justify the dejection of the inclosure of the  
common or way.

§ 63. If a nuisance be made to my land in which I have an  
estate for years, I may still deject the nuisance. Nor need  
there be any previous notice or demand given. In many cases  
irreparable mischief might occur, as to growing crops by the  
cutting off or damming up a channel, if the party aggrieved

were forced to wait for the slow process of the law; and he may therefore take the law into his own hands, but he must use no more force, nor work greater damage than sufficient to abate the nuisance, and to restore the condition of things to the *status ante bellum*. It will be advisable however, where no *immediate* inconvenience or damage accrues, to resort to the law; as thereby all chance of affrays and breaches of the peace is avoided; and a Court of Equity will interfere by Injunction, where the right is clear and the injury manifest. In *Blakemore v. Glamorganshire Canal Navigation Company*. Lord Brougham said,

“The leading principle then on which I proceed in dealing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is, that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay further injury, to keep things as they are for the present.”

And a *fortiori* will the Court afford an ample remedy when the infringement is already complete.

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## E R R A T A.\*

- p. 37 § 4 for *relent* read ... rebut.
- p. 38 § 6 for *interest* doctrine ... inherent doctrine.
- p. 41 § 8 line 2 *the* country ... this country.
- p. 51 line 2 Sir J. Turner ... Sir G. Turner.
- p. 56 § 5 line 13 *meant* ... most.
- p. 58 line 7 *Marshelley* ... Marshalling.
- p. 61 line 14 *an* Atty &c. ... in Att &c.
- p. 67 § 4 line 2 *Subtitilas* ... Subtilitas.
- p. 64 § 6 line 3 *Goodsall* ... Godsall.
- p. 65 note (w) for *S. Sm.* read ... 1 Sm.  
*volumma* ... volumina.
- p. 67 line 8 *tittle* ... title.
- p. 81 line 3 I do think ... I do not think.
- p. 83 § 7 line 7 in *such* ... in each.
- p. 84 § 9 line 11 *but if* ... lest.
- p. 85 line 4 word *in* omitted after *consists*.
- p. 86 § 14 line *unrpations* ... usurpations.
- p. 87 for *espret* read *esprit*; and for *an risque* ... *au risque*.
- p. 88 § 19 line 7 adopt ... adapt.
- p. 96 § 5 line 6 *marten* ... master.
- p. 101 *Paley* ... Pasley and so also in § 3 line 1.
- p. 110 note (c) read *sec* in 23 *Skingley*.
- p. 122 note (d) line 3 *pointed* ... pledged.
- p. 129 § 26. From line 5 expunge from "The Defendant down to of them : this passage is merely a repetition of the passage on same page beginning at line 3.
- p. 141 line 5 *legal* ... illegal.
- p. 155 note (h) line 2 *few* ... flow.
- p. 156 line 21 *behalf* ... belief.

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\* Owing to the hurry with which the first part of this work was passed through the Press, many errors and misprints have crept into the text, for which I have to apologize.

- p. 157 line 2 *partly* ... parity.
- p. 166 § 9 line 1 *arising* ... arises.  
                                   line 5 *entreaty* ... entirety.
- p. 167 line 2. This line should be connected with next para.
- p. 190 § 31 line 9. After "allowed to" insert "transfer to another a right which to himself has not, But the exception is founded in the value of the transaction in question which."
- p. 213 line 7, Expunge from C. H. I. to crimes p 214. expunge C. H. I.—crimes There also and *body* is twice used for boy.
- p. 215 *adpaucos* ad paucos.
- p. 216 line 1 *has* ... as ... see para 3.  
                                   voluntarius dœnion ... voluntarius dæmon.  
                                   for *u uamamne deeget nam omne detegit*.
- p. 222 note (a) *lex non cogit ad impossibilia*.
- p. 223 line 1 *by* ... in.
- p. 236 § 15 line 6 for *be*, lie ; and see same error lower down.
- p. 242 § 15 line 6 *owing* ... owning.
- p. 243 line 21 strike out *says*.
- p. 244 § 16 line 5 before the word *other*, supply "and neither of them does or says anything tending to impose upon the"
- p. 255 § 40 line 4 *perpetuate* ... perpetrate.
- p. 280 § 83 line 8 *before dulent* ... be fraudulent.
- p. 284 § 93 line 10 *laging* ... buying.
- p. 285 line 2 *for chattel* ... or chattel.  
                                   line 25 *serving* ... severing.
- p. 290 § 3 line 6 *paid* ... unpaid.
- p. 291 § 4 line 9 *or that it*  
 The passage should be "A purchased an estate, with notice of an incumbrance, or that it" &c.
- p. 292 § 5 line 2 *rather* ... either.
- p. 295 § 11 for V. C. Wood, read Sir J. Romilly *M. R.*
- p. 298 line 4 Expunge from 'make to transactions.'
- p. 297 note (m) Atk. 291.
- p. 299 line 4 after *would be* supply ... no.
- p. 300 Expunge "*The Plaintiff may supply himself with other articles of the same description elsewhere.*"
- p. 308 line 4 strike out the word *not*.
- p. 313 Insert Lord. *Cranworth* after *Meynell v. Surtees* and strike out *Cranworth* before *Williams v. Williams*.
- p. 314 § 15 line 6 *felt* ... left.

|                                                      |     |                |
|------------------------------------------------------|-----|----------------|
| p. 315 line 4 before <i>an</i> insert <i>where</i> . |     |                |
| p. 316 note (x) <i>Brotham</i>                       | ... | Woollam.       |
| same line <i>Bat</i>                                 | ... | But.           |
| (F) <i>W H C.</i>                                    | ... | W L C.         |
| p. 322 note (n) for <i>Worther</i>                   | ... | Webster.       |
| p. 330 Heading ; for <i>Truth</i>                    | ... | Trusts.        |
| p. 357 note (n) for J. P.                            | ... | L. J.          |
| § 47 <i>lopass</i>                                   | ... | losses.        |
| p. 378 § 3 line <i>Oopis</i>                         | ... | Copis.         |
| p. 404 § 20 if the second                            | ... | in the second. |
| p. 428 § 31 <i>Huxburgh</i>                          | ... | Roxburgh       |
| p. 466 heading : <i>Using</i>                        | ... | Usury.         |
| p. 481 <i>Legeh</i>                                  | ... | Lege.          |

*E. A. L. O.*  
*5/29/41*

Klyrodosia : dividing of the inheritance  
Klyrodoteo : To divide by lot : appoint as heir:  
Klyrodoteis : Testator.  
Klyronomus : heires : "To make an heir" Ho:  
"testuere haeredum" - to institute an heir.

### Traces of Dattaka ~~Shikha~~

Dr. Hall's Contribution towards an index to the Bible  
of the Indian Philosophical Systems.

Polished by order of the Govt. N.W.K.  
Dwaita-nirnaya Baptist Mission Press.  
1859

That Vāchaspati MISRA, the lexic, was a  
different person and of posterior date, is proved  
conspicuously, by the fact, that in his Dwait  
nirṇaya he cites "Vardhamana upādhyāya  
Akṛika". - Page 21

#193-

Dwaita nirṇaya (means settlement of Duality)  
A treatise of unascertained character or some-  
how connected with Mīmāṃsā -  
The Work quotes . . . . .  
"Bhaveda"

5193 a wife & from 519 to be born - in whom the  
man is (born again), that is to say he is reborn  
in his children. Wilson says

3193 & 5193 27:

Under the Official  
Trustee is 17 of 1864 can  
be taken advantage of by  
non-official Trustees  
on the act  
of 27. + 28 of 1869  
are made applicable to  
English cases.



